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IN THE

Supreme Court of the United States

October Term, 1952

No. ~~538 Misc.~~ 407
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Record not printed

ROBERT NORBERT GALVAN,

Petitioner,

vs.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

Statutes

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert Norbert Galvan, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment of that Court entered on the 9th day of January, 1953, affirming a judgment of the United States District Court for the Southern District of California, Southern Division, entered January 23rd, 1952, denying a petition for a writ of habeas corpus; and refusing to issue a writ of habeas corpus upon said petition. Said decision of the Court of Appeals is reported in 201 F. 2d at pages 302-306. [R. 27-34.]

Statement of Matter Involved.

The petition recites [R. 2-5] that Robert Norbert Galvan is unlawfully imprisoned, detained, confined, and restrained of his liberty by the Commissioner of the United States Department of Immigration and Naturalization, and by U. L. Press, the Officer in Charge, at San Diego, California. That the cause of said detention was a certain order or decision of deportation entered after an administrative hearing at which insufficient evidence was produced to sustain the deportation charge. That there was no evidence at all showing that the petitioner believes in or taught "The Overthrow of the Government of the United States" by force or violence or any other means.

The petition further recites that there was no evidence to show the petitioner ever had any intent to join the Communist Party, or that he ever subscribed to any of the teachings of said party, or that he had any intent to interfere with, impair or influence the loyalty, morale or discipline of the Military or Naval Forces of the United States, nor was there any evidence that petitioner violated any of the provisions of the Act of June 28, 1940, entitled "An Act to Prohibit Certain Subversive Activities."

Said petition further alleged that petitioner had not been given a fair, impartial and unbiased hearing by the Immigration and Naturalization Service.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 9, 1953 [R. 27-34]; and a petition for rehearing was denied on March 9th, 1953 [R. 36]. The issues as to which petitioner seeks the Court's review, involving construction of Federal Statutes and the Constitution of the United States, were decided adversely to petitioner, by the United States Court of Appeals, 201 F. 2d 302-306. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

Questions Presented.

1. Whether the Act of October 16, 1918, as amended (8 U. S. C. 137, as amended by the Internal Security Act of 1950; 8 U. S. C. 137 (2) (c); 8 U. S. C. 137-3 (a) is Constitutional.

2. Whether the evidence produced at the administrative hearing is sufficient to sustain the deportation charge.

3. Whether the appellant was given a fair and impartial hearing.

4. Whether the administrative hearing before the Immigration Service was legally conducted and the procedure required by law followed.

Constitutionality.

Petitioner contends that the Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950, and as applicable to this case, is invalid under the Due Process clause of the Fifth Amendment.

In *Harisiades v. Shaughnessy*, 72 S. Ct. 512, the Court said:

> "In historical context the Act before us stands out as an extreme application of the expulsion power."

The Internal Security Act of 1950 went even further than the Act being considered by the Supreme Court in the above case. Counsel does not believe that this amendment can stand the test of the Due Process clause of the Fifth Amendment. This Act made mere membership in the Communist Party of the United States specifically a basis for deportation and eliminated the necessity of proof that the individual believed in, advocated or teaches the overthrow by force or violence of the government.

The Act, as so amended was discussed by the Supreme Court in *Carlson v. Landon*, 72 S. Ct. 525, but the issue in the cases therein decided was not the Constitutionality of the additional basis for deportation, but the right to bail under another Section of the same Act. Therefore, the decision in the *Carlson v. Landon* case is not controlling.

Does deportation by mere proof of membership in the Communist Party of the United States meet the requirements of the Due Process clause of the Fifth Amendment?

That the legislative committee realized the dangerous ground upon which this legislation was propounded is indicated by the following language from the report accompanying the bill:

> "The committee approached the problem with care and restraint because it is believed essential that any legislation recommended be strictly in accordance with our constitutional traditions. How to protect freedom from those who would destroy it, without infringing upon the freedom of all our people, presents a question fraught with constitutional and practical difficulties. We must not mortally wound our democratic framework in attempting to protect it from those who threaten to destroy it."
>
> (U. S. Code Congressional Service (2) 81st Congress, Second Session 1950, Page 3888.)

The Act, as amended, states that an alien may be deported because he was a member of a class. No one can justifiably say that we have no Communists in our midst who are inimical to our security or that if an alien is shown to be hostile to our safety and welfare that we should lack the power to expel him.

However, the concurring opinion of Justice Murphy in the case of *Bridges v. Wixon*, 326 U. S. 135 (163), is so pertinent and applicable that the following is quoted:

> "There is no evidence, moreover, that he understood the Communist Party to advocate violent revolution or that he ever committed or tried to commit an overt act directed to the realization of such an aim.

> The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. Schneiderman v. United States, 326 U. S. 118, 154, 87 L. Ed. 1796, 63 S. Ct. 1333. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941) pp. 472-475.
>
> Yet the deportation statute on its face and in its present application flatly disregards this rule. It condemns an alien to exile for beliefs and teachings to which he may not personally subscribe and of which he may not even be aware. This fact alone is enough to invalidate the legislation."

And it was earlier stated in *Bridges v. Wixon, supra,* at page 160, as follows:

> "From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirement of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis of their banishment."

The Act is to be condemned not only because it provides for arbitrary expulsion for membership in a class alone, even though said membership be in fact completely without knowledge of the aims and purposes of the class, but also because it affords no discretion to the enforcing authorities to withhold expulsion upon adequate proof of such circumstances. It is submitted that these tenets violate the very substance of the Due Process Clause.

The Evidence Is Insufficient to Sustain the Charge.

The Petitioner was ordered deported on the charge that he had been after entry a member of the Communist Party of the United States. There is insufficient evidence to sustain this charge. The Communist Party of the United States is only mentioned in two places in the hearing record. On page 93 of the certified record the petitioner was asked whether he had ever been a member of the Communist Party of the United States and he refused to answer on constitutional grounds. On page 118 of the certified record a witness for the government was asked:

> "Let me put it this way then. Do you have any knowledge as to whether or not Mr. Galvan held any offices in the Spanish Speaking Club unit of the Communist Party of the United States? A. Yes he did."

Certainly no charge can be sustained on the basis of the petitioner's refusal to answer.

Secondly, as to answer of the witness, the Examining Inspector has assumed facts which were not in avidence, namely, that the Spanish Speaking Club was a unit of the Communist Party of the United States, and, in any event, certainly the Government should not be considered as having sustained its case on such a shred of evidence.

On first blush, it would seem that this is a tenuous argument and that everyone would assume that the testimony taken pertained to the Communist Party of the United States, but it should be pointed out that when the Government chooses to rely on mere proof of membership, without documentary evidence or concrete facts, then the

least that can be afforded the petitioner is the right to have the Government prove the charge which they have lodged in the terms of the statute. If the Government is going to base their case on verbal testimony, at least the verbal testimony should sustain the charge and not leave the same to conjecture.

There is no evidence of petitioner's membership in any Communist Party, documentary or otherwise, except the two statements made by petitioner, pages 173 to 188 of the certified record, which he later refuted, pages 33 to 67 of the certified record, and the questionable testimony of one witness. The Government, to sustain the charge of petitioner's membership in the Communist Party of the United States, relied upon the admissions of the petitioner. The admissions, however, were not, unequivocal and an analysis of the questions in answer to which such admissions were made indicates clearly the insufficiency of the admissions to sustain the charge.

> "Q. Then you became secretary of Local 64 prior to the time you joined the Communist Party? A. That's right. [Certified Record, p. 177.]
>
> Q. You were a member of the Communist Party from about 1944 to 1946. Is that correct? A. Something like that. [Certified Record, p. 178.]
>
> Q. Then you were a member of the Communist Party from approximately 1944 to 1946 when you dropped out. Is that correct? A. Yes." [Certified Record, p. 179.]

If the petitioner was a member of the Communist Party of the United States in the community where he has resided for many years, as alleged, certainly the investigative forces of the Government could have shown something concrete, something irrefutable, something a reason-

able man would put confidence in when arriving at an important decision.

This is an important case to the petitioner. As said by Mr. Justice Douglas in his dissenting opinion in *Harisiades v. Shaughnessy, supra:*

> "Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair."

Such are the facts in the instant case. If the charge be true, sufficient evidence must have been available. One must assume that either the Government could not or chose not to present it. In either event, the charge should not stand on the evidence here presented.

The Petitioner Was Not Given a Fair and Impartial Hearing.

At the time of the hearing on December 12, 1950, Title 8, Code of Federal Regulations, Section 151.2(d) provided as follows:

> "(d) Hearing Officer; additional charges. If during the hearing, it develops that there exists grounds in addition to those stated in the warrant of arrest why the alien is subject to deportation, the hearing officer may lodge additional charges against the alien and shall develop evidence upon such charges in like manner as on the charges contained in the warrant of arrest. . . ."

In this matter the warrant of arrest charged the petitioner with:

> "The Act of October 16, 1918, as amended, in that, after entry, he has been a member of the following class of aliens enumerated in Section 1 of the said Act: An alien who was a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow, by force and violence, of the government of the United States;
>
> The Act of October 16, 1918, as amended, in that, after entry, he has been a member of the following class of aliens enumerated in Section 1 of said Act: An alien who was a member of and affiliated with an organization, association, society and group that write, circulates, distributes, prints, publishes and displays, and causes to be written, circulated, distributed, printed, published and displayed, and that has in its possession for the purpose of circulation, distribution, publication, issue and display, written and printed matter advising, advocating and teaching the overthrow by force and violence, of the government of the United States."

In this case the hearing examiner did not lodge an additional charge but a different charge. The charges in the warrant of arrest were abandoned. The petitioner was found deportable on the new and different change. The hearing examiner attempted to explain this as follows:

> "Mr. Tong, with your permission, I would like to lodge an additional charge, and I do lodge at this time the following additional charge, which charge, although similar to that stated in the warrant of

arrest, appears to be the more specific charge. I charge that the respondent is subject to deportation on the ground:

The act of October 16, 1918, as amended, in that he is found to have been after entry a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States." [Certified Record, p. 36.]

The unfairness of this procedure is further emphasized by the fact that the examining officer obtained a stipulation to permit the use of the record previously made in the case, determined that the petitioner had not been out of the United States since the last hearing, lodged a new charge and then said: "I have no further questions to the respondent at this time in regard to the deportation charges." [Certified Record, p. 36.]

The unfairness of this procedure is also demonstrated by the fact that the evidence admitted under the stipulation did not sustain the charges then pressed. But after the examiner lodged the new charge, that evidence, admitted by prior stipulation, became the sole basis for the warrant of deportation which was issued on the newly lodged charge, not the original charges. While it is realized that this is not a criminal matter and that the technical rules involved in pleading to an indictment or information need not be strictly followed, counsel feels that the situation is analogous and that the basic principles of fairness should govern such an administrative proceeding. Surely this Court will not sustain as fair, a situation in which a defendant charged with a crime, stipulated to the

admission of evidence which did not sustain that crime, only to have the prosecutor change the crime with which the defendant was charged and, in the same proceeding, convict him solely on the evidence admitted by the stipulation. It is submitted that the Court should not consider any evidence admitted by such stipulation prior to the lodging of the new charge, and that, eliminating such evidence, there is no evidence remaining to support the findings of fact of the Immigration Officials and of the District Court.

Where the evidence was improperly received and where but for such evidence it would be speculative whether the requisite finding would have been made, then there is deportation without a fair hearing which may be corrected on habeas corpus. Such was stated by the Court in *Bridges v. Wixon, supra,* page 156:

> "In these habeas corpus proceedings the alien does not prove that he had an unfair hearing merely by proving the decision to be wrong. (Tisi v. Tod, 264 U. S. 131, 133, 44 S. Ct. 260), or by showing that incompetent evidence was admitted and considered. Vajtauer v. Commissioner, 273 U. S. p. 106. 47 S. Ct. p. 304, 71 L. Ed. 560. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus. See Vajtauer v. Commissioner, *supra.*"

The Hearing Was Not Legally Conducted and Procedure Was Not Followed as Required by Law.

A warrant for the arrest of the petitioner in deportation proceedings was issued on August 13, 1948, by authority of the Attorney General on the charges set forth above. Hearings were conducted on these charges on March 10, 1949 and on January 12, 1950. These hearings were vitiated by the decision of this Court in *Sung v. McGrath,* 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616, which held that the Administrative Procedure Act was applicable to deportation proceedings. Appropriate objection had been made to the procedure used by the Immigration Officials by counsel then representing the petitioner. [Certified Record, p. 79.] Thereafter, Congress, on September 27, 1950 exempted deportation proceedings from the applicable provisions of the Administrative Procedure Act by the enactment of Public Law No. 843, 81st Congress, Second Session.

At the hearing held on December 12, 1950, the counsel then representing the petitioner and the examining officer stipulated to the use of the previous testimony and exhibits which might have cured the defect and illegality of the previous hearings except for the fact that the examining officer thereupon lodged a different charge, not set forth in the original warrant of arrest.

Again counsel for the petitioner wishes to reiterate the argument set forth above in regard to the unfair hearing. It is felt that legal procedure required a regularly conducted hearing on a new warrant of arrest in which

the petitioner would have had a right to defend himself on the basis of the charge set forth therein. Of course, it will be argued, as stated by the examining officer, that the charge was "similar to that stated in the warrant of arrest" [Certified Record, p. 36] but the answer to that argument is that if it was the same charge then there was no purpose in Congress amending the law as was done during the period in which these proceedings were being conducted.

If the hearing was unfair, if there was no legal evidence to support the findings of fact or if error of law was committed, the proceedings should be set aside. Such was stated by this Court in *Kessler v. Strecker*, 307 U. S. 22, 34, 59 S. Ct. 694, 83 L. Ed. 1082.

> "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside."

Conclusion.

It is respectfully requested that the petition to the Supreme Court of the United States that a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

HARRY WOLPIN,

Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1953

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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INDEX

CASES CITED

STATUTORY MATERIAL

OTHER AUTHORITIES

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OCTOBER TERM, 1953

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 27-34) is reported at 201 F. 2d 302. The District Court entered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1953 (R. 35), and a petition for rehearing was denied on March 9, 1953 (R. 36). The petition for certiorari, filed on May 25, 1953, was granted on October 12, 1953. This Court has jurisdiction over the cause pursuant to 28 U. S. C. 1254(1).

Statute Involved

Prior to 1940 the Act of October 16, 1918 (40 Stat. 1012, 8 U. S. C. 137), provided inter alia for the deportation of aliens who were currently members of organizations advocating the overthrow of the Government by force and violence. By amendment in 1940 (54 Stat. 673), membership in such an organization at any time in the past, after entry, was made an additional cause for deportation. The 1950 amendment (Section 22 of the Internal Security Act of 1950, 64 Stat. 1006) added to the existing law the provision here in issue, for deportation on the basis of membership at any time in the past in the Communist Party. The sections effecting this addition, as incorporated in Title 8 of the United States Code, read as follows, at the time involved in this case:

"§ 137. * * *

Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * *.

§ 137-3. * * *

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 137 (2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."[1]

[1] These provisions were recodified and reenacted without material change by the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 204) and now appear in the United States Code as 8 U. S. C. 1251(a)(6)(C).

Statement of the Case

Facts

Petitioner, a native-born citizen of Mexico, entered the United States legally with his mother and sister in 1918 at the age of six, and has resided here continuously for the past thirty-five years (T. 174-175).[2] He is married to a native-born American citizen, and is the father and sole support of four native-born American citizen children, aged 8, 11, 13 and 14 (T. 176, 61).

Since 1940 petitioner has worked at the Van Camp Sea Food Company and in 1944 was a member of the union in that company's plant pursuant to a union shop agreement (T. 37). With the encouragement of the leaders of his union he joined the Communist Political Association in 1944 (T. 177-180), at a time when the Communist Party had been dissolved. See *Dennis* v. *United States*, 341 U. S. 494, 498.[2a] After the transformation of the Association into the Communist Party with objectives diametrically opposed to those of the Association (*ibid.*), there is no evidence as to petitioner's joining the Party, although he apparently attended its meetings (T. 179, 188). While the one witness who testified against him stated that she had seen him at meetings closed to "Party members," she did not differentiate in her testimony between members of the Party and the Association, nor did she indicate what she considered the indicia of Party membership nor the basis for her conclusion that the meetings were of the character she attributed to them (T. 114, 127).

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[2] Petitioner, because of poverty, was granted leave to proceed in this Court on the typewritten record. The record is in two parts, the record of proceedings in the Court of Appeals, herein designated "R." and the record of proceedings in the District Court, herein designated "T."

[2a] The instant record does not make clear that the name of the organization petitioner joined in 1944 was the Communist Political Association.

Proceedings

After two sworn statements had been taken from petitioner by an Examining Inspector on March 17, 1948 (T. 173) and March 31, 1948 (T. 183), respectively, a warrant was issued charging him with membership in an organization advocating, and with distributing literature advocating, violent overthrow of the Government (T. 68). Hearings were held under this warrant on March 10, 1949 (T. 68) and January 12, 1950 (T. 78). When these hearings were rendered invalid by the decision of this Court holding that the Administrative Procedure Act was applicable to deportation proceedings, a new hearing was held on December 12, 1950 (T. 33). At this hearing the record of the previous hearings as well as petitioner's statements to the Examining Officer in March 1948 were admitted as exhibits (T. 34, 35). Because the statutory amendment providing for deportation for past membership in the Communist Party (supra, p. 2) had been passed in the interim between the first and second hearing, the additional charge was lodged against petitioner in the course of the second hearing that he had been a member of the Communist Party of the United States (T. 36).

On December 19, 1950, the hearing officer found that petitioner had been a member of the Communist Party from 1944 to 1948, and ordered his deportation on that ground under the 1950 Act (T. 31-32). On July 25, 1951, the findings and decision of the hearing officer were adopted by the Assistant Commissioner, and, on September 26, 1951, an appeal was dismissed by the Board of Immigration Appeals.

Petitioner's petition for a writ of habeas corpus, filed in the District Court for the Southern District of California on December 17, 1951 (R. 5), alleged *inter alia* that the evidence did not show that petitioner ever belonged to the Communist Party (R. 2), that he never had any intent to join it nor did he subscribe to its doctrines (R. 3), nor

did he ever believe in the violent overthrow of the United States government (R. 3), and that the deportation order rested on an erroneous construction of the term "member" in the deportation act (R. 3). On January 23, 1952, the District Court denied the petition (R. 16-17), and on appeal to the Court of Appeals for the Ninth Circuit, that Court affirmed the District Court's order (R. 27-34).

Specification of Errors

1. The conclusion that petitioner was a member of the Communist Party within the meaning of the deportation statute is arbitrary and without support in the evidence. The order for his deportation on the basis of such membership is therefore unauthorized by the act and in violation of the due process guarantee of the Constitution.

2. The statute as here interpreted to provide for deportation on the sole basis of past membership in the Communist Party, is unconstitutional, because it is not reasonably related to the Constitutionally permissible objective of the deportation power and penalizes innocent as well as knowing membership.

3. The provision for deportation of persons who have at any time in the past been members of the Communist Party violates the due process guarantee of the Constitution in that it substitutes legislative fiat for the fair hearing ensured by this guarantee.

4. The statute as here interpreted violates the Constitutional prohibition of bills of attainder and ex post facto laws.

Summary of Argument

I

A. The only evidence in the record that petitioner join any organization relates to his joining the Communi Political Association in 1944 at a time when the Communi Party was non-existent. The Association's program wa according to this Court's opinion in the *Dennis* case, "o of cooperation" and support of this Government (341 U. at p. 498). When the Association was transformed in the Communist Party with a program diametrically o posed to that of the Association, there is no evidence of p titioner's joining the latter. There was no showing wha soever of the usual indicia of membership, such as application for membership or payment of dues. And a presumption that his membership in the first organizati was transferred to the second is refuted by the great di ference in the aims of the two organizations, by petitione lack of sympathy for the Party's aims, and by his condu in regard to the Party; it is further refuted, viewing t situation from the Party's standpoint, by the unlikeliho that it would have regarded the transfer of his membe ship as desirable.

Not only is the order of deportation unsupported evidence, but it is based on an erroneous interpretation the term membership which, under this Court's decisio must be construed as connoting a serious, intentional a definite commitment to the Communist Party.

II

A. A deportation statute which is wholly arbitrary a bears no relation to the objective of ridding the country undesirable residents, is outside the Constitutional pow of Congress. The instant statute is not reasonably relat to that objective on the basis suggested in the *Harisiad*

case that withdrawal from the Party was unlikely to reflect a change in viewpoint. In *Harisiades* the Court had before it resignations during a juncture in Party affairs which made resignations for the purpose of concealing membership a likelihood. But in withdrawals at ordinary times, as in petitioner's case, rather than at such special periods, the circumstances point to a presumption that the withdrawals were in good faith. Thus, the instant statute cannot be justified on the assumption that the numerous aliens who withdrew from membership in the ordinary course of affairs over the entire thirty-five-year span of the Party's existence, which is covered by the instant statute, did so as a mere ruse rather than because of an honest change of conviction.

B. The statute is arbitrary not only because it makes deportable those who have rejected whatever belief they may have once had in violent overthrow, but also because it makes deportable those who never had such a belief.

Petitioner's case is typical of those who entered the Communist Party (assuming arguendo he did so), supposing that it was, as it appeared to be to the uninitiated at the time they joined, a democratic "progressive" organization, and who were not, during their brief membership, taken into the more advanced echelons which would have known of its advocacy of violence. During the 1930's and early 40's, when the Party's membership expanded and the instant statute would therefore have its greatest applicability, the Party emphasized to the general public and its own rank and file membership, devotion and support to this Government, rather than opposition to it. Its literature at that period, far from advocating violence, urged the necessity of resort to the ballot to elect its candidates to political office. The courts approved its place on the ballot, and this Court as well as others, held that the evidence was not convincing that it advocated violence, even when the most damaging of the Party documents was presented to

them. Unlike Harisiades but like petitioner, the great majority of the members did not become part of the inner core of the Party which may be presumed to have been familiar with its covert doctrine of violent overthrow. Thus, it is arbitrary and against reason to assume from mere membership in the Communist Party at any and all times in the past a knowledge that its leaders advocated violence. Nor, by the same token, can it be reasoned that persons who joined the Party at any and all past times were imbued with a spirit of defiance towards our Government, rather than that they were misled by its professed aims of social progress.

C. This Court has never to date approved imposition of a penalty on innocent membership. In a consistent line of cases this Court has held that membership in an organization advocating violence could only be deemed a disqualification for public office or employment if it were informed and knowing membership. These holdings are clearly applicable to the instant statute, for: in the case of qualification for public employment as in the case of deportation of aliens, only the most minimal Constitutional protection is deemed applicable; the public security is equally or even more at stake in the subversion of government employees than in deportation of aliens; and the deprivation here imposed because of membership is far harsher than the loss of employment—indeed, loss of employment is only one element of the deprivation when the penalty is deportation.

D. If the statute is read as imposing the penalty of deportation on innocent as well as knowing membership, it is unfairly retrospective, and imposes deportation on persons who had no warning that their activity would be so penalized. Despite the limited protection accorded aliens under due process, this Court's decisions establish the applicability to deportation of the Constitutional doctrine

that the Government must give notice of the acts it will penalize.

E. The statute, as it has here been interpreted, is unconstitutional for the further reason that it imposes, without reasonable justification, a drastic restraint on the First Amendment rights to which resident aliens are entitled. If without warning, aliens who have been innocent members of organizations can thereafter be subjected to deportation for their past membership, it is apparent that aliens will be restrained from participating in even the most innocent-appearing organizations.

To save the statute from doubts as to its constitutionality and to accord with its true intent, it should be construed as applying only to membership in the Communist Party with knowledge of its advocacy of violence.

III

Congress' proscription in the instant statute of former members of the Communist Party for the penalty of deportation, violates the basic Constitutional principle against special legislation. Particularly since the statute decides the undesirability for residence not only of aliens who are at present Communist Party members but of those who have been members at any time in the past on the basis of the assumed character of the Communist Party at all past times, Congress has departed from its proper function of enacting policies and principles of general applicability and has instead engaged in adjudication by fiat.

By establishing a presumption as to Communist Party membership at all past times, the Act deprives the alien of his right under due process to a fair hearing. For he gets no hearing as to the existence of the fact which is the supposed basis for inferring his undesirability: the organization's advocacy of violence during his membership. Like the treatment of charges against Government employees involved in *Joint Anti Fascist Committee* v. *Mc-*

Grath, 341 U. S. 123, and the criminal charge in *United States* v. *Spector,* 343 U. S. 169, the elements establishing deportability are divided, and a vital element is subtracted from consideration in the hearing. Such a substitution of fiat for a quasi-judicial determination is a method of nullifying the guarantee of due process.

IV

A statute like the instant one, singling out a named class of persons for a penalty and imposing the penalty on the basis of past conduct so that there is no possibility of escaping the legislative proscription, is a typical bill of attainder. All the statutes that this Court has held to be bills of attainder have, like the instant one, employed civil sanctions; and all of them have been defended in like vein, on the allegation that they were regulatory measures directed at the prevention of some evil, rather than attempts to punish the designated groups. But as this Court said recently: "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" *Garner* v. *Los Angeles Board,* 341 U. S. 716, 722.

The determinative circumstance in every decision holding a statute to be a bill of attainder was the Court's conclusion that it did not in fact bear the alleged reasonable relation to the prevention of an evil, and therefore must be deemed a legislative effort at punishment in the mere guise of a regulatory measure. Since the instant statute as here interpreted is not reasonably related to the alleged evil and to the only purpose for which the deportation power can Constitutionally be used: ridding the country of undesirable residents,—it is a bill of attainder on the proscribed group.

Besides violating the Constitutional prohibition on bills of attainder, the instant statute as here interpreted vio-

lates the related prohibition on ex post facto laws. Under the latter clause, as well, a statute imposing a civil sanction is deemed to impose a punishment if it is not reasonably related to the evil at which it is allegedly directed. Judged by this test, the instant statute as here interpreted must be deemed to impose a punishment; and since it imposes punishment after the fact on acts that were done innocently and with no warning of a penalty at the time thereof, it is *ex post facto.*

ARGUMENT

I. The conclusion that petitioner was a member of the Communist Party within the meaning of the deportation statute is arbitrary and without support in the evidence. The order for his deportation on the basis of such membership is therefore unauthorized by the Act and in violation of the due process guarantee of the Constitution.

We shall show that all the evidence in the record as to petitioner's joining of an organization relates to his joining an organization in 1944, at a time when the Communist Party was non-existent. The Communist Party was dissolved in 1943, and its reconstitution did not commence until 1945. *Dennis* v. *United States*, 341 U. S. 494, 498, note 1. It is clear from this circumstance and from the record that if petitioner in fact took out membership in any organization in 1944, it was in the Communist Political Association, whose program was, according to this Court "one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period" (*ibid.*). After the transformation of the Association into the Communist Party with a program diametrically opposed to that of the Association (341 U. S. at p. 498), there is no evidence that petitioner either took out membership in the Party or that any membership he possessed in the Communist Political

Association was transferred to the Party; indeed, the evidence all refutes these conclusions. Lacking support in the evidence, the deportation order is void. *Tisi* v. *Tod,* 264 U. S. 131, 133; *Kessler* v. *Strecker,* 307 U. S. 22, 34. We are, of course, aware that the Internal Security Act provides for deportation for membership in the Association as well as in the Communist Party; however, we assume this Court will only consider the validity of the deportation order as written by the Immigration officials. It is to be noted that the provision for deportation for membership in the Communist Political Association raises even graver constitutional questions than does the provision under which the instant order was framed.[3]

A. Failure of Evidence as to Communist Party Membership.

In petitioner's preliminary examination by an Examining Inspector, which is the major source of the evidence against him, petitioner said,—in answer to a question about his being asked to join "the Communist Party" in 1944: "I was told that it wasn't a party at that time; that it was a political assocation. * * * They had no intention of overthrowing the Government or anything; they were just trying to improve the living conditions of the people, of the working class" (T. 179). His understanding that he was being asked in 1944 to join the Communist Political Association, and that its nature was peaceful and democratic is of course fully corroborated by the facts, as related by this Court in the *Dennis* opinion, and there is no word to the contrary in the present record. The fact that petitioner did not attempt to correct and contradict the examining officer when the latter kept referring during the examination to the Communist Party, although it in fact did not then exist and petitioner was well aware of the distinct characteristics of the Association, is wholly attributable to the circum-

[3] This may explain the Immigration Service's concentration on attempting to bring the petitioner within the provision respecting membership in the Communist Party rather than the Association.

stances of the examination. Petitioner was not accorded the right to counsel; and a perusal of the examination as a whole clearly indicates he had been led to believe that acquiescence and docility, rather than an attempt at self-defense, was his best chance to avoid deportation. When formal charges were nevertheless lodged, his right to counsel in his hearing on the charges was of little avail, since his acquiescent replies to the misleading questions on the preliminary examination were introduced in evidence against him.[4] The circumstance that the petitioner, misled by the Examining Inspector, did not draw a distinction in nomenclature between the Communist Political Association and the Communist Party is immaterial; the distinction in program and objective was clear to him and the material fact is that the organization he allegedly joined in 1944 was not the Communist Party, as the Immigration Service found, but was in fact the Association.

While we doubt there is trustworthy evidence that petitioner took the step of becoming a member even of the Communist Political Association, we shall assume arguendo that he was such a member and proceed to consider his status vis-a-vis the Communist Party. Some time in 1946 after the national top leaders of the Communist Political Association had commenced "to transform that organization into the Communist Party" and to change its policies "from peaceful cooperation with the United States * * * to a policy * * * which worked for the overthrow of the Government by force and violence" (*Dennis*, 341 U. S. at p. 498), one George Lohr took charge of Communist Party affairs in petitioner's locality, and apparently took over the meetings of the erstwhile Communist Political Associa-

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[4] It may also be noted that petitioner was not allowed the benefit of counsel in determining whether to claim the privlege against self-incrimination in his preliminary examination, and that his subsequent claim, on the advice of counsel, was of no avail because the record of the preliminary examination was introduced against him (T. 94-98, 104).

tion. Lohr began to express the view that "the Party thought it had been neglecting its role and that Capitalism could no longer be trusted," leading petitioner to "believe that they (sic) were going to take more drastic means as far as action in politics was concerned" (T. 187-8). About six months after Lohr launched the new regime, petitioner stopped attending meetings (T. 188).

There is no evidence whatsoever of petitioner's engaging in any act to secure membership in the Communist Party, such as applying for membership, receiving a membership card, or paying dues. Indeed, while the ex-Party member who was the Government's witness testified as to her Party membership card (T. 116) and as to the collection of dues (T. 120), there is a conspicuous failure to question her as to petitioner's possession of a card or the collection of dues from him.

While we would concede that ordinarily there might be an inference from the fact one organization is transformed into another, that a member of the former became a member of the latter, there is the strongest countervailing evidence against any such presumption in the instant case. The Communist Party, as reconstituted, was, according to the *Dennis* opinion, the antithesis of the organization petitioner had joined (341 U. S. at p. 498); rather than advocating overthrow of the Government, the Association had emphasized support and assistance to the Government in the war effort and in the social betterment measures concomitant to prosecution of the war. The record indicates that petitioner's interest in these objectives of the Association was stimulated in the labor union to which he belonged, perforce, under a union shop agreement in the plant where he had been employed for several years (T. 37, 185, 180). In addition to this basis for his interest in the Association, the record indicates that, with the encouragement of the leaders of the union, he hoped through affiliation with the Association to gain advancement to an office

in the union (T. 180, 178, 127).[5] But there is no shred of evidence that he ever had any sympathy, or could have been led to have any sympathy, for the goal of overthrowing or opposing our Government. Indeed, affirmative evidence that he had no such sympathy is supplied not only by his own statements of his belief (T. 181; and see T. 185), but by the fact that such a doctrine was apparently contrary to his religious convictions (T. 180), and by his willingness to now join the Communist Party for the purpose of giving information about it to the Government (T. 182, 188). Under all these circumstances, particularly the dissimilarity of the organizations, no inference of membership in the organization emerging from the transformation can be drawn from membership in the original one.

Viewing the matter from the Communist Party's standpoint it is as unreasonable to assume petitioner became a member, as it is viewed from petitioner's. It is not to be supposed in the absence of evidence to this effect, that when the Party attempted to organize as the conspiracy described in the *Dennis* case—"adept at infiltration into strategic positions, use of aliases, and double-meaning language * * * [and] rigidly controlled" (341 U. S. at p. 498)—that it would have automatically absorbed into membership those who differed from its objectives, who had never indulged in secrecy, aliases, or conspiracy. It is particularly unlikely that the Party would have considered it suitable to automatically absorb a person who, like petitioner, had had no connection with the Party prior to the days of the Communist Political Association. It cannot be assumed that the Party would have absorbed such a person with no

[5] It is to be noted that in 1950 after the reconstitution of the Communist Party and after the "cold war" with Russia drew the battle-lines between Communist and non-Communist more clearly, the C.I.O. expelled this union, which was part of the Food, Tobacco, Agricultural, and Allied Workers Union of America, among others as Communist-dominated. See *Tisa* v. *Potofsky*, 90 Fed. Supp. 175 (S. D. N. Y., 1951); Proceedings, 12th Constitutional Convention of Congress of Industrial Organizations (Nov. 20-24, 1950), p. 69.

Party background into membership without some subscription on his part to the principle of overthrow, of which there is here no scintilla of evidence. Moreover, it is to be remembered that the Party adopted the policy in 1939 of excluding aliens from membership (see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 595).[6] Thus, there is not only no evidence of petitioner's membership in the Communist Party, but no basis either from his standpoint or the Party's,[7] for supposing it existed.

Certainly petitioner's attendance at meetings for a limited time after the Party was reconstituted does not support the deportation order. The statute requires membership, not mere attendance at meetings. In the absence of any evidence that he assumed membership in the Party, it can only be inferred that he continued attending meetings held at the site and under the same general supervision as the Association's, until he became aware of the transformation of the Association. Indeed, his attendance under the circumstances does not even reflect any type of sympathy for the Party's aims. While the reconstitution of the Party by the top national leaders commenced in April 1945, there is no evidence of the date when local leaders

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[6] It should be noted that Meza, the witness against petitioner, who was a Party member, was an American citizen (T. 111). The Party policy was adopted to avoid deportation proceedings on the basis of the alien's current membership (342 U. S. at p. 593), and therefore would have continued at least until the *Harisiades* decision countenanced deportation of some past members.

[7] But even assuming that the Party considered all members of the Association, including aliens, as Party members, such a transfer of "membership" without an expression of agreement by the purported member, from the organization he joined to one of diametrically opposed principles, could hardly be considered the voluntary membership intended by the Act. As to the Act's coverage only of voluntary membership, see remarks of Senator McCarran, the Act's sponsor, in discussing an amendment thereto, that "'such membership must be a *real* membership * * * I do not think that Congress meant to authorize the expulsion of aliens who pass from one organization into another, supposing the change to be a mere change of name * * *'." 97 Cong Rec., Part 2, p. 2373 (March 14, 1951).

adequate to launch the new program were found and the transformation of the small local units of the Association was initiated. There is thus no reason to disbelieve petitioner's testimony that he stopped attending meetings after the Party's program was in part revealed (T. 187-188).[8]

The mere name "Communist Party" if it was used at the initial meetings after the Party's reconstitution, was certainly not sufficient to demonstrate to petitioner that the organization was to advocate violent overthrow of the Government. In 1942 the highest court of California, and in 1944 the District Court of Appeal of California in the area in which petitioner was living, had ruled that the Communist Party had a right to be on the ballot in California,[9] and it so appeared on the ballot as a regular political party during the early '40s. That the Party carried on substantial political activity in that period and that its political role appeared authentic, is attested by the fact that over 57,000 voters voted for the Communist candidates in the 1940 elections in California and over 26,000 in 1942.[10] Such political activity is the antithesis of advocacy of violence (see *Harisiades*, 342 U. S. at p. 592). Indeed, all the pronouncements and literature of which the public, including petitioner, could have known in the '30s and early '40s dealt with peaceful and democratic reform (for further discussion of the Party's democratic guise at that period, see infra, pp. 29-30). Further, in this Court's

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[8] Compare, for example, the fact that the dissolution of the Communist Party nationally, which commenced in 1943 according to the *Dennis* opinion, was not endorsed in California until a meeting of the State Convention on May 7, 1944, and was not announced to the general membership in the newspaper of the Los Angeles County Committee until May 16, 1944. See *Record*, publication of the Los Angeles County Committee of the Communist Party, for May 16, 1944, p. 1, col. 1 (on file in the Office of the Clerk of this Court).

[9] *Communist Party* v. *Peek*, 20 Cal. 2d 536, and *Deming* v. *Communist Party*, 64 Cal. App. 2d 35, respectively.

[10] Figures on file at the Office of the Registrar of Voters, Los Angeles, California.

decision in the *Schneiderman* case in 1943, which undoubtedly was given substantial publicity in California, because it involved a prominent California Communist, the Court had held it was a "tenable conclusion" on the basis even of the Party's more esoteric and scholastic pronouncements, that the Party did not advocate violent overthrow of the Government.[11] Accordingly, petitioner could not have had notice that "Communist Party" meant advocacy of violence.

Thus, there not only is no evidence of the usual indicia of Communist Party membership—such as application for membership, payment of dues, adoption of a Party name—but there is no evidence of a sympathy for the Party's objective which might have led to membership, and indeed there is affirmative evidence of a lack of sympathy. Further, it is clear and undisputed that petitioner severed his contact with the Party by merely stopping coming to meetings, and this was the end of the matter (T. 179-180). This is hardly the way the Party, established as the conspiratorial organization described in the *Dennis* case, would have permitted a member to act.

The testimony of Meza, the sole witness called by the Government, does not contradict our conclusion that the deportation order lacks support in the evidence. In examining her as in examining petitioner, the Immigration Inspectors manifested a shocking failure to try seriously to ascertain the facts bearing on petitioner's Communist Party membership or lack of it, and a shocking disregard of the important and obvious distinction between the Communist Political Association and the Communist Party. Instead, the Examining Inspector again attempted

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[11] *Schneiderman* v. *United States*, 320 U. S. 118, at p. 157. This Court there also noted an earlier decision in the Federal Judicial Circuit covering California that judicial notice could not be taken of force and violence as a Communist Party principle and that the evidence presented as to its principles in 1922 was not applicable a decade later. *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9th, 1930).

to rest on petitioner's alleged "admissions" and to fill the gaps in the witness' testimony through the suggestive phraseology of his own questions. Thus, asking Meza whether she recalled any conversation with petitioner "in regard to the Communist Party" (T. 125), the Examining Inspector elicited the answer that petitioner had told her "how he had become a member of the Communist Party because they had * * * promised * * * that he would be secretary-treasurer * * * of the local [union]" (T. 127). The Immigration Service ignored the fact that petitioner's remarks to Meza unquestionably related to his joining the Communist Political Association in 1944; it is to be noted that he became secretary-treasurer of the local in 1944 or at the latest early 1945 (T. 38-39).

Meza also testified as to petitioner's position, at a date as to which she was considerably confused,[12] in a group called the Spanish Speaking Club (T. 118-119). Contrary to the statement in the Government's brief in opposition to the petition for certiorari, Meza at no time called this Club a "unit" of the Communist Party. This terminology was used solely by the Examining Inspector (T. 110-127; as to the witness, see also T. 156-157). On the contrary, her testimony made it clear that this Club was *not* a Communist unit and that it was instead an organization of the type the Communists joined in their "United Popular Front" period which included Communists and non-Communists. For Meza testified that meetings were held that were open only to the members of the Club who were Communists (T. 114), a situation clearly contradictory to the Examiner's assumption that the Club as a whole was a Party unit. She further testified that the meetings that were "closed * * * to Communist members" were attended by petitioner (T. 114). We submit, however, that in view

[12] Confusion, reflecting heavily on Meza's credibility, is evident throughout her testimony. Thus, on the one hand she claims that she was opposed to the Party at the time she joined it (T. 137), and on the other she speaks of her unhappiness at developments in the Communist line as if she had been a bona fide member (T. 134).

of the lack of distinction in her testimony between membership in the Association and membership in the Communist Party, and in view of the utter failure of the Inspectors to determine how she knew the persons present at the alleged meetings to be Communist Party members or what she considered to be indicia of membership or of a "closed" meeting, her statement that the people present at these meetings were Party "members" is not evidence, but is merely an unreliable conclusion of the witness. Certainly, her layman's description of the persons at these meetings as "members," without more, does not support the conclusion that petitioner was a member of the Communist Party within the meaning of the Internal Security Act and is to be deported as such.

B. Construction of Term "Member" in Deportation Provision.

This Court and the Court of Appeals have made it clear that "membership" within the meaning of the deportation statutes requires a definite and serious commitment from the alleged member to the organization and a connection between them of real content. While "affiliation" has been discussed more extensively than "membership", because definite indicia of membership such as issuance of a Party book or payment of dues—all completely lacking in the instant case—are customarily relied upon, it is clear that "membership" is considered an even stronger bond than "affiliation." If the connection is insufficient to amount to "affiliation," it is *a fortiori* that it does not amount to "membership."

In ruling on the meaning of affiliation in *Bridges* v. *Wixon*, 326 U. S. 135, this Court said:

> "It imports * * * less than membership but more than sympathy. * * * Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the

> proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition" (at pp. 143-144).

And the Court quoted with approval (326 U. S. at p. 142) the language of the Court of Appeals for the Second Circuit in *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2, 1935), holding that affiliation with the Communist Party is not proved unless the alien is

> "more than merely in sympathy with its aims. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith."

In discussing the intent of the Act, Senator McCarran, its sponsor, pointed out that the term member was intended to be given the same construction it had been given under previous acts.[13] Furthermore, he particularly emphasized and quoted the language of a lower court opinion as to the original 1918 Act that the Act was intended only to refer to "real membership" and not to persons alleged to be "members," but who had no "real knowledge" of the organization's "platform and purposes."[13a]

Even aside from the sponsor's statement, it is apparent that under the Internal Security Act, which is more extreme than any of the previous statutes in that it provides for deportation on a mere showing of past membership in a named organization, at least as rigorous a concept of membership as that prevailing under past Acts must have been intended.[14] The evidence here wholly fails

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[13] See Cong. Rec., loc. cit. *supra* note 7.

[13a] Ibid.

[14] Compare *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10: a statute inflicting the harsh penalty of deportation must be strictly construed.

to meet this test: There are no formal indicia of membership; there is no evidence of an aim to further the objective of the Communist Party; there is no evidence of any relationship of dependability having been established between the Party and petitioner; on the contrary, when petitioner discovered the objectives of the Party, he simply stopped coming to meetings. Membership cannot be found with such casual unconcern for the meaning of the term and for the evidence as it was in the instant case.

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The order of deportation is void because it is without support in the evidence (*Tisi* v. *Tod*, 264 U. S. 131, 133; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106) and because, as in the *Bridges* case, the "alien is ordered deported for reasons not specified by Congress," in that the finding, there of affiliation, here of membership, "was based on too loose a meaning of the term" (326 U. S. at p. 149).

The conclusion of the lower courts that the order was supported by evidence is clearly erroneous. These courts totally ignored the deficiencies in evidence and, like the Immigration Service, were apparently not alert to the real and important distinction between the Association and the Communist Party;[15] further they gave no consideration to the meaning of "membership" as used in the Internal Security Act. This Court's duty of review is greater than ordinary where as here the validity of the order depends on the decision of a question of law—the construction of the statute—and where, in addition, the lower court did not have any greater opportunity than this Court to ap-

[15] We suggest that even if this Court should believe there might be evidence to support the conclusion that petitioner became a member of the Communist Party after it was re-constituted in 1945, the conclusion that he was a member in 1944, when the Party was nonexistent, is indisputably erroneous. Since the Commissioner might not have found petitioner was a Party member at any time except for the indisputably erroneous premise that he joined it in 1944, for this reason alone the deportation order should not be upheld. Cf. *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80.

praise the credibility of witnesses. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671. And where deportation of a long-time resident—a penalty which may deprive him "of all that makes life worth living"[16] is involved, the Court's duty of securing for him all procedural safeguards to which he is entitled, is of the highest moment. *Bridges* v. *Wixon*, 326 U. S. at p. 154.

II. The statute as here interpreted to provide for deportation on the sole basis of past membership in the Communist Party, is unconstitutional because it is not reasonably related to the constitutional objective of the deportation power and penalizes innocent as well as knowing membership.

A. The statutory provision, as here interpreted, is outside the deportation power of Congress because it is not reasonably related to the constitutional objective of the power.

Despite the broad discretion of Congress to determine the classes of aliens subject to deportation, this Court has never suggested that the power can be used arbitrarily or without relation to the purpose for which it is possessed by Congress. Even in the case of the plenary and sovereign power to make war, and even when it is invoked in the face of a crisis endangering national survival, its purported exercise must show a reasonable relation to the Constitutionally intended purpose of this power. *Hirabayashi* v. *United States*, 320 U. S. 81, 94-95; *Korematsu* v. *United States*, 323 U. S. 214, 217-219; *Ex Parte Endo*, 323 U. S. 283. So, too, the power to deport must be exercised " 'under the paramount law of the Constitution' " (*Carlson* v. *Landon*, 342 U. S. 524, 537). Thus, in the *Harisiades* case,[17] this Court, while pointing to the breadth of Congressional discretion, in no way countenanced the view that the deporta-

[16] *Ng Fung Ho* v. *White*, 259 U. S. 276, 284.

[17] *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

tion power could be exercised without relation to its intended purpose: the purpose of ridding the country of aliens who are undesirable residents.[17a] Indeed, if the statute has no reasonable relation to this end, it is not a bona fide exercise of the power, but is merely a disguised attempt to accomplish a purpose outside of Congressional competence.[18]

1. Meaning of Resignation From Party Under Ordinary Circumstances.

In the *Harisiades* case this Court dealt with a provision which, like the instant one, based deportation on past organizational membership; there, the statutory basis for deportation was membership in an organization found to have been advocating violent overthrow of the Government at the time of membership, and the Communist Party was found, after hearing, to be such an organization. But neither Harisiades nor Coleman, whose case was joined to his, had, as the opinion and Government brief in the case emphasize,[19] resigned their membership because of a changed viewpoint; they ceased to be members because the Party discontinued the membership of alien members in 1939 in order to avoid the effect of the deportation laws, as interpreted in that year. Thus, this Court found that the criterion of past membership in the organization could be deemed related to present undesirability in that discontinuance of membership might very well show no

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[17a] The Court of Appeals in that case was willing to "assume that a statute would be invalid which directed deportation for some cause having no rational relation to the public welfare." *Harisiades* v. *Shaughnessy*, 187 F. 2d 137, 141 (C. A. 2, 1951).

[18] See *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330; *Interstate Commerce Commission* v. *Oregon*, 288 U. S. 14; *The Pipe Line Cases Cases*, 234 U. S. 548.

[19] See 342 U. S. at pp. 582-583, 595; see Government's brief, pp. 4, 10, 85-86.

"change of heart" on the part of the alien (342 U. S. at pp. 595, 593).

We contend, however, that this reasoning is inapplicable to the statute now at bar. To take the case of petitioner as an initial illustration—unless guilt is to be conclusively presumed in disregard of the realistic probabilities, there is no reason whatsoever to doubt that petitioner's severance of Party membership (assuming arguendo he possessed it), was bona fide. We agree that resignation would not be likely to show a changed philosophy if it occurred at the time of some particular juncture in Party affairs: for example, in 1939, the year involved in the *Harisiades* case; or at the commencement of the current prosecutions of Communists under the Alien Registration Act, upheld in the *Dennis* case in 1951. But absent a special juncture in Party affairs making dissimulation a likelihood, it is much more probable than not that a resignation is bona fide. Indeed, the basic premise of our democracy, that truth will be accepted over error, indicates the likelihood that Communists will come to recognize their error; and in the absence of a particular crisis in Party affairs that would stimulate a ruse as to membership, this likelihood must be credited. And it is to be noted that as to the great majority of past members of the Party, Party membership was not sufficiently prolonged to indicate Party doctrine gained a deep foothold; for, on the basis of F. B. I. figures, it appears that among the approximately 700,000 past members of the Communist Party in this country, the average length of membership was two or three years.[20]

That Congress itself made provision for the change of heart of a past Party member is apparent in the statutory provision allowing naturalization of aliens who have not been members for ten years prior to their petition for nat-

[20] Ernst and Loth, *Report on the American Communist* (1952) p. 14.

uralization;[21] aliens who have not been members for ten, twenty or thirty years, however, are automatically deportable under the instant provision. Indeed, as here interpreted, a past member would be deportable though his change of view had been manifested in his having "actively opposed" the Communist ideology,[22]—opposition which would, moreover, remove the barrier to his admission to this country if he were a non-resident seeking admission.[23] And as pointed out by the President's Commission on Immigration and Naturalization, criticizing the instant provision, those who have left the Party in good faith are likely to be more strongly opposed to it than the average person, because they have actually experienced its operations.[24] Thus, considering that the instant provision covers everyone who has ever been a member of the Communist Party no matter how long in the past and no matter when or how his resignation occurred, it is highly unreasonable, arbitrary, and punitive.

Even in the situation considered in *Harisiades,* where concededly there was some likelihood the resignation lacked

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[21] See section 25 of the Internal Security Act of 1950, amending section 305(c) of the Nationality Act of 1940, now codified as 8 U. S. C. 1424(c).

[22] See, for example, the opinion of the Board of Immigration Appeals in *In re Mita* (pending for review in the District Court for the District of Columbia, in *Mita* v. *Brownell,* Civil Action 5397-53), where the Board said the "sole issue" before it was whether Mita had been a Party member, and "even present hostility to Communism, if such exists; or loyalty to the United States, if that be demonstrated," is irrelevant. See also *Gomez* v. *Brownell,* pending in the same Court (Civil Action 4914-53), where the past member attended two meetings in 1937 and resigned because membership conflicted with his faith in Catholicism.

[23] 8 U. S. C. 212(a)(28)(I), subd. b. Thus, aliens who are ordered deported under the instant provision both are eligible for naturalization and are aceptable for admission to this country.

[24] *Whom We Shall Welcome,* Report of the President's Commission on Immigration and Naturalization (submitted Jan. 1, 1953 to the President) pp. 227-228.

bona fides, we submit it was nevertheless unprecedented for this Court to suggest that ex-members who had in good faith had a "change of heart", were deportable along with those who had not, because it might be "an almost impossible burden" for the administrators to separate them (342 U. S. at p. 595). This court has heretofore condoned the Government's failure, because of difficulties of proof, to separate the innocent from the guilty only under conditions of national crisis when the danger was so imminent that temporary emergency steps had to be taken and there was no time to make a distinction.[25] Further it is to be noted that proof of whether the resignation indicated a changed philosophy would not ordinarily be subjective or abstruse, but would depend on the circumstances surrounding the resignation and the situation of the Party at the time. No unusual difficulty is apparent, in determining that someone in a situation like Harisiades' did not show by his resignation a change of heart, and that a change was shown by a severance in a situation like petitioner's, the latter being, we submit, far more representative of the class deportable under the instant statute, considering that it covers the entire period of existence of the Communist Party.

2. Ignorance of Rank-and-File Past Member as to Party's Advocacy of Violence.

But even assuming there might be justification in reason for classing together all persons who had at any time subscribed to advocacy of violent overthrow, it is clearly arbitrary and unrelated to the objective of expelling undesirable residents, to class with them those who at *no* time so subscribed. The instant statute as here interpreted, makes aliens deportable who, not even in the past, believed in overthrow of the government. For the statute has been

[25] See *Hirabayashi, Koremats*u, and *Endo* cases, cited *supra*, p. 23.

interpreted as meaning that it is irrelevant whether the member even knew that this was the Party's objective (see Respondent's Return to Petition for habeas corpus, R. 8). This interpretation does not result merely in a few instances of injustice; we submit that there is a greater likelihood that an alien caught in this dragnet and unreasonable provision never believed in violence than that he did. We concede that if there were any indication of the alien's present connection with the Party he might be deemed dangerous regardless of whether he subscribed to Party principles; but where the possibility of his dangerous activity rests on the possibility of his continuing under the influence of a belief he had in the past, it is obvious that his expulsion has no connection with danger if he did not even in the past have the proscribed belief.

To take petitioner's case again as an initial illustration, if we assume arguendo that petitioner became a member of the Communist Party, there is no doubt that the avenue through which he came to the Party was the Communist Political Association which stood for peaceful and democratic support of the Government (see, *supra,* pp. 11-12). Considering this basis for his introduction to the Party, and considering that he dropped out of it after its program of more belligerent action was in part revealed to him (*supra,* pp. 14-18), it would be an application of "guilt by association" to the point of complete arbitrariness to assume that he embraced the Party's aim of overthrow of the Government. And, in view of the Party's representation of itself as a peaceful political party during its previous decade of existence (supra, p. 17 and infra, pp. 29-31), the petitioner had no reason to be on notice of the Party's subversive aim. The situation illustrated by petitioner's case is entirely different from that of the aliens in *Harisiades,* who had been active participants in the inner core of the

Communist Party,[26] and he is doubtless representative of many aliens who had belonged to the Communist Political Association and came into the Party briefly through the avenue of its appeal as a non-violent organization.

Perhaps more important in demonstrating the arbitrariness of the instant provision, is consideration of the Party's situation in the 1930's and early '40's, prior to the formation of the Communist Political Association, for it was then that it had its highest membership.[27] It was during this period that the Party, rather than standing for overthrow of the Government, emphasized collective security and assistance to the Government in fighting Fascism, as well as greater benefits under this Governmental system for labor and various minorities.[28] The Party membership card in the '30's made no mention of overthrow of the Government, merely glorifying the Party as "the vanguard of the working class." [29] Though earlier Party literature had

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[26] Thus, the Government's brief related as to Harisiades:

> By his own admission Harisiades was * * * an active functionary of the Communist Party from 1925 to 1939 * * *. He asserted his belief in Marxism-Leninism during the period of his membership, and stated that he still believed in those doctrines * * *. He participated in controlling the policies of a Communist newspaper and was Secretary of the Greek Bureau of the Communist Party * * *" (p. 47).

[27] As to the 1940's, see Ernest and Loth, *loc. cit. supra* note 20, at p. 33; as to the 1930's consider Wechsler, *Age of Suspicion* (1953) pp. 145-150; Hearings before Un-American Activities Committee of House of Representatives (83rd Cong., 1st Sess.) (Communist Methods of Infiltration, Education) pp. 4-14, 59-60, 107-109, 113; and the fact that the vote for Communist candidates nationally was over 102,000 in 1932 and over 80,000 in 1936 as compared to 48,579 in 1950. See New York Post, Dec. 17, 1953, p. 7, col. 1, reporting compilation of figures by the Democratic National Committee.

[28] See Hearings, *loc. cit. supra* note 27; Wechsler, *op. cit. supra* note 27, at pp. 86-88.

[29] *Strecker* v. *Kessler*, 95 F. 2d 976, 977 (C. A. 5th, 1938), affirmed on other grounds, 307 U. S. 22.

discussed violent overthrow,[30] literature circulated in this country during that decade not only did not urge violence, but did not hint of such a possibility. Thus, a leaflet circulated by the Communist Party of California in 1936, entitled "Why You Should Join the Communist Party" and soliciting members, represented that the Communist Party was fighting along with the Democratic Administration against Republican opposition, for higher wages, social security, labor rights, and collective security against fascist aggression (see Appendix to this brief, p. 61). And in "What is Communism," written for the more erudite public in 1936, by Earl Browder, the then head of the Party, it was represented that the Communists did not advocate violence.[31] A commentator even in a sophisticated non-Communist journal of opinion viewed the Party as a "grass roots" movement.[31a] The Party's 1942 literature was in the same democratic political vein as in the previous decade; it called for the election of Communist candidates because they were fighting for such things as child care centers, repeal of the sales tax, support of the Administration's tax program, "everything to win the war," and to "smash the fifth column" (see Appendix, p. 63). And the Party's 1942 program called for all-out production to support the war effort, maintenance of living standards, and "unity of the United Nations based on the American-British-Soviet alliance" (see Appendix, p. 65). Through the '30's and '40's, except during the Nazi-Soviet Pact, Party membership required no partisanship for Russia as against the United States because the Party

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[30] See *Schneiderman* v. *United States*, 320 U. S. 118.

[31] See note 52 (1942) Yale Law Journal, 108, 128, quoting Browder's book. And see similar analysis of Party position in Ward, *Communist Party and the Ballot*, 1 (1941) *Bill of Rights Review* (publication of American Bar Association) 286, 290.

[31a] See Barnes, *American Dream*, Atlantic Monthly for Jan., 1937, reprinted in Hearings on Institute of Pacific Relations, before the Subcommittee to investigate administration of the Internal Security Act of the Senate Judiciary Committee, 82nd Cong., 2d Sess., pp. 544-549.

emphasized only their allegedly common objectives. Indeed, even as late as 1946, the current knowledge and concept of the Communist Party as an advocate of overthrow of the Government was not full realized even in relatively suphisticated circles.[32]

The courts in the period in question were unconvinced that the Party advocated violence, and their opinions doubtless aided the Party to spread the view that it did not so advocate. In 1930, the Court of Appeals for the Ninth Circuit held that violent overthrow was not so clearly a principle of the Communist Party of the United States that it could be judicially noticed as such and that testimony as to the Party's character in 1922 did not establish its character in 1930.[33] And in 1938, in language recited in an affirming opinion of this Court, the Court of Appeals for the Fifth Circuit held on the basis of the Party membership book, which merely recited that the Communist Party was "the vanguard of the working class," and on the basis even of the Party literature selected by the Government to show advocacy of violence, as well as the Party's activity in the Presidential election, that there was no evidence of the Party's then advocating violent overthrow of the Government; it further held, to the same effect as the Ninth Circuit's ruling, that the decisions as to the Party's character in the 1920's were no longer applicable.[34] And in 1943 this Court, even on consideration of the Party's theoretical and pontifical literature of the 1920's said in the *Schneiderman* case:

> "For some time the question whether advocacy of governmental overthrow by force and violence is a principle of the Communist Party of the United States has perplexed courts, administrators, legislators, and

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[32] See Wechsler, *op. cit., supra*, note 27, at p. 223, describing viewpoint in 1946 of former Vice-President Wallace.

[33] *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9th, 1930).

[34] *Strecker* v. *Kessler*, cited *supra*, note 29.

> students * * *. With commendable candor the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal' * * *. The 1938 Constitution of the Communist Party of the United States, which petitioner claimed to be the first and only written constitution ever officially adopted by the Party * * * ostensibly eschews resort to force and violence as an element of Party tactics * * *. A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counteroverthrow * * * " (320 U. S. at pp. 147, 148, 156-157).

And of utmost significance is the circumstance that throughout this period the Party's conspicuous and undeniable activity not in theory but in fact, was that of a regular political party, backing candidates for numerous elective offices.[35] As already noted, the fact that it engaged in considerable propaganda on the political front and gave the appearance of being an authentic political party, is attested by the fact that the Communist candidates polled over 102,000 votes nationally in 1932, over 80,000 nationally in 1936, and in California alone 57,000 in 1940 and 26,000 in 1942 (see supra, notes 10, 27). This Court, in the *Harisiades* opinion, recognized "the freedom to advocate or promote Communism by means of the ballot box" and the antithesis between this method and violence.[36]

With the Party's overshadowing emphasis in the days of its largest membership on a non-violent program, with so

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[35] See cases cited *supra*, note 9, as to judicial approval in California of the Communist Party's appearance on the ballot. And see as to appearance on ballot generally, Ward, *op. cit., supra* note 31.

[36] 342 U. S. at p. 592. And see Ernst and Katz, *Speech: Public and Private*, 53 (1953) Columbia Law Rev. 620, as to the lack of danger from open propaganda.

much doubt in those days as to even its theoretical position on violence, with decisions of this Court as well as the lower courts giving currency to this doubt,[37] in view of these facts it is arbitrary and unreasonable to assume that violent overthrow was known as a basic tenet of the Party by the rank-and-file membership.[38] The Party was not during its "Popular Front" days the close-knit organization it was found to be the last few years; and even now this Court has indicated doubt that the full membership is party to the plans and intentions of the leaders.[39] That in prior decades the Party had many "dupes" as to the purposes of the inner core is indubitable. That it did not take the majority of its members, who only remained in the Party for two or three years (supra, p. 25)[40] into its inner councils, or trust this rapid-turnover group with knowledge of its illegal purpose, seems clear.[41] Nor is it conceivable that when it attracted 100,000 members during

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[37] The Court of Appeals' opinion in *Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2nd, 1951) as to the Party's advocacy of violence seems based on the Party's character in 1925. But even if it be taken as referring to the 1930's, it is contemporaneous, rather than retrospective opinions, and in particular those carrying the prestige of this Court, that we must consider in determining whether aliens had reason by virtue of judicial opinions to realize that the Party had the aim of overthrow.

[38] Indeed, even if there had been Party pronouncements on this score, "every utterance of party leaders is not taken as party gospel." *Schneiderman* v. *United States*, 320 U. S. at p. 155. And see *Bridges* v. *Wixon*, 326 U. S. at pp. 147-148.

[39] See *Dennis* v. *United States*, 341 U. S. 494, 516.

[40] Compare *Dennis* v. *United States*, 183 F. 2d 201, 230 (C. A. 2, 1950), where the Court held that the defendants, because they were Party leaders and "had been affiliated with the Party * * * for many years" could be deemed to know the basic Party doctrine.

[41] And see note 52 (1942) Yale Law Journal, 108, 114: "* * * the difficulty of a member's achieving actual knowledge of the aims of an organization is illustrated by testimony of two of the government witnesses [in the *Bridges* case] that they were members of the Communist Party for several years before unearthing its allegedly basic purpose—the use of force and violence."

the alliance between this country and Russia in the early 1940's, by its Win-the-War program,[42] that it would have publicized to such a broad mass its objective of violence while continuing to strive for more members on its cooperative Win-the-War platform.

Indeed, the Court below itself pointed out that petitioner and many others were in the Party only as the result of ignorance and gullibility, and of being misled by the Party leaders (201 F. 2d at p. 303).

Just as it is arbitrary to assume from all past Communist Party membership regardless of its period or duration, a subscription to the aim of violent overthrow, such past membership cannot, by the same token, be taken to signify a spirit of defiance of our law (compare *Harisiades,* 342 U. S. at p. 594). No defiance can be inferred when, as was true during the period of its greatest membership, the Party appeared to be a legal political organization, cooperating with the Government; and members joined because, like petitioner, they were interested in participating in an allegedly "progressive" organization (to use the language of those times).[43] Considering the guise of the Party during the period, its deception even of the more studious as to its objective, and the spirit of the times, the alien who joined during the 1930's and the 1940's prior to the "cold war" with Russia, was much more likely to have been stimulated by a sense of his freedom, along with the citizen population, to exercise his rights of free expression and association in lawful activities,[44] than by a spirit of defiance. He was much more likely to have been stimulated by the spirit of innocent "joining" that is, or at

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[42] See Ernst and Loth, *loc. cit., supra,* note 27, and Appendix to this Brief, p. 65.

[43] See Hearings, *loc. cit., supra,* note 27.

[44] As to these rights, see *Bridges* v. *California,* 314 U. S. 252; *Bridges* v. *Wixon,* 326 U. S. 135, 148.

least used to be, "the most characteristic of American attitudes" [45] than by a spirit of revolt.

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The Congressional reasons for enacting the Internal Security Act, stated in section 2, all relate to the danger from persons at present active in and assisting the Communist movement; we do not doubt that aliens who are, in reasonable likelihood, in this class can be deemed undesirable residents and deportable as such. But the instant provision for deportation for membership at any time in the past in the Communist Party, as here interpreted, is not reasonably related to the objective of expelling those endangering our security. For we have shown that there is both a high probability that those who joined the Party, particularly during the periods of its highest membership, did not know of the objective of violent overthrow of the government, as well as a high probability that members of the Communist Party who left it at any time other than during a few crucial periods in its affairs, in fact resigned because of a "change of heart" as to its program and manifested the end of any agreement they may have had with its subversive aim. Lacking reasonable relation to the only objective of the deportation power permissible under the Constitution, the instant statute as it has been here interpreted, cannot be deemed a Constitutional exercise of that power. Rather, it must be considered a punishment inflicted on those who were ignorant or naive enough to at any time join the Party, and who lacked the prescience borne of 1953 hindsight.

B. The decisions of this Court establish that a refusal to distinguish between innocent and knowing membership is arbitrary.

This Court's decision in *Weiman* v. *Updegraff*, 344 U. S. 183, rendered since *Harisiades*, throws light on the ques-

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[45] See *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part).

tion of *scienter*, which was not considered in the earlier opinion. In the *Weiman* case the statute provided that past membership in certain organizations disqualified a person for Government employ; there as here the Constitution was considered to extend only the most minimal protection against the measure in issue, for the legislature has the broadest discretion with respect to employment in the Government departments, and their maintenance free from subversion.[46] Recognizing doubt even that any "right to public employment exists" this Court held only that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory" 344 U. S. at p. 192. But even under this minimal standard, the Court determined that it was unconstitutional, because "patently arbitrary," to base exclusion from public employment on past membership in an organization without considering whether the member had knowledge of its purposes. Holding the statute unconstitutional because it did not except innocent membership from the disqualification, the Court said:

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had

[46] Indicating the breadth of discretion accorded the legislature in dealing with qualifications of public employees and their minimal Constitutional protection, is this Court's much-quoted statement in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, again quoted in *Weiman* (342 U. S. at pp. 191-192) that the only regulation as to public workers that could with certainty be deemed a Congressional abuse of discretion would be a "regulation providing that no Republican, Jew or Negro shall be appointed to federal office." Thus the concept of Congressional discretion with respect to public workers is highly similar to that with respect to deportation. Compare statement in Court of Appeals' opinion in *Harisiades* case as to "blue-eyed aliens" (187 F. 2d 137, 141).

joined (but), did not know what it was * * *'.[3] At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.

"[3] Testimony of J. Edgar Hoover, Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122, 80th Cong. 1st Sess. 46." (Footnote as in court's opinion) (344 U. S. at pp. 190-191).

And in *Garner* v. *Los Angeles Board*, 341 U. S. 716, which involved a similar disqualification for public employment and a similar minimal due process protection, the Court upheld the statute only because it assumed the disqualification would not affect

> "those persons who during their affiliation with a proscribed organization were innocent of its purposes, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation. We assume that scienter is implicit in each clause of the oath." (Footnote omitted; 341 U. S. at pp. 723-721.)

And see this Court's decisions in the *Adler* and *Gerende* cases, on which it relied in *Weiman*[47]; in these cases as well, statutes establishing a disqualification for public employment or public office on the basis of organizational membership were held valid only because they were construed as disqualifying solely those members who had had knowledge of the organization's objective of violent overthrow. To date, this Court has not approved a deprivation on the basis of innocent membership.

[47] *Adler* v. *Board of Education*, 342 U. S. 485, 494-495; *Gerende* v. *Election Board*, 341 U. S. 56, 57; cited in *Weiman*, 344 U. S. at p. 189.

We submit that the instant provision which does not even allow, as did the statutes involved in the above cited cases, for a hearing as to the organization's purposes, and which imposes a harsh penalty of a much more drastic and punitive nature than disqualification for public employment, must, on the authority of these decisions, be held arbitrary and unconstitutional unless it is construed as imposing deportation only on those past members of the Communist Party who knew of its advocacy of violence (see infra, p. 42, for the argument that the statute should be so construed).

C. The statute as here interpreted is invalid because it restrains First Amendment rights without reasonable justification.

The statute as here interpreted to make petitioner and others like him deportable though they did not know or have reason to know when they joined the Communist Party that it advocated violent overthrow, imposes a drastic restraint on the exercise by resident aliens of their constitutional rights to freedom of expression and association.[48] For it is apparent that if Congress can order the expulsion of past innocent members of organizations, aliens will fear to participate in even the most innocent-appearing organization. They may, years after their innocent activity, find themselves subjected to the harshest of penalties as a result! If "it matters not whether association existed innocently or knowingly," the consequence

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[48] As to resident aliens' right of free expression, see cases cited supra note 44. And the right to join organizations is part of First Amendment freedom. *American Communications Association*, 339 U. S. at p. 400. See also *Garner*, 341 U. S. at p. 728 (Frankfurter, J., concurring in part).

We would respectfully take issue with the Court's reasoning in *Harisiades* from the *Dennis* opinion (342 U. S. at p. 592), that no First Amendment right is restrained when advocacy of violent overthrow is restrained; for the *Dennis* case appears only to deal with such advocacy when it creates a clear and present danger. However, consideration of this question is not necessary in the instant case.

is to "inhibit individual freedom of movement" and "to stifle the flow of democratic expression." *Weiman,* 344 U. S. at p. 191. As pointed out in *Garner,* such retroactive penalization of association that at the time appeared innocent "is bound to operate as a real deterrent to people contemplating even innocent associations. * * * All but the hardiest may well hesitate to join organizations * * * " (*Garner,* 341 U. S. at p. 729, Frankfurter, J., concurring in part). There, the proscription which was thought to deter all but "the hardiest" was disqualification from public employment; here, with the possibility of banishment from home, family, and means of livelihood as a result of innocent-appearing association, it would seem that no one, even the hardiest, would risk it.

Regardless of other Constitutional standards, the fact that the statute has the effect of restraining the exercise of First Amendment rights in itself requires its careful scrutiny and its invalidation unless it is reasonably necessary to security. *American Communications Association* v. *Douds,* 339 U. S. 382.[49] The restraint on the rights of free expression imposed by the deportation of innocent past members of the Communist Party under the instant statute cannot, as we have already shown, be justified as reasonably necessary to our security or indeed in any way reasonable; and the statute as here interpreted is therefore unconstitutional.

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[49] "By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment * * * the fact that no direct punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements undoubtedly have the same coercive effect upon First Amendment rights as imprisonment, fines, injunctions, or taxes * * * the distinction is one of degree and it is for this reason that the effect of the statute in proscribing beliefs * * * must be carefully weighed. * * * We must, therefore, undertake the 'delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'" (339 U. S. at pp. 393, 402, 409, 400; by Vinson, C. J.)

D. The Statute as Here Interpreted Violates the Guarantee of Due Process Because It Operates Retrospectively and Without Fair Notice to Those Deportable Thereunder.

The fact that petitioner did not know nor have reason to know when he allegedly belonged to the Communist Party that it advocated violence or that it was considered by the courts to be an organization so advocating (see discussion of decisions, supra, pp. 17, 31-32), and the fact that such knowledge was unlikely on the part of many aliens during their membership in the Party (see pp. 29-34, supra), renders the statute as here interpreted invalid for yet another reason. For, under this interpretation a drastic penalty is inflicted on petitioner and other innocent members of which they had no warning at the time of their membership.

Despite the limited protection accorded aliens under the due process guarantee, this Court has made it clear that basic fair play is assured them.[50] A penalty imposed retroactively without warning is the most "essential injustice."[51] Accordingly, in *Bugajewitz* v. *Adams*, 228 U. S. 585, 591, this Court indicated that a retrospective provision for deportation would be unconstitutional. And more recently in *Jordan* v. *DeGeorge*, 341 U. S. 223, involving deportation on the basis of convictions of crimes involving moral turpitude, this Court recognized that the Constitutional requirement of fair notice is applicable to deportation statutes and that the alien must be "forewarned" as to the acts that would result in his deportation (341 U. S. at p. 232). The Court said:

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct * * *. This Court has repeatedly stated that criminal statutes which fail to

[50] See *Wong Yung Sang* v. *McGrath*, 339 U. S. 33, 49-50.

[51] See *Screws* v. *United States*, 325 U. S. 91, 101; *American Communications Association* v. *Douds*, 339 U. S. 382, 413.

> give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process * * *. Despite the fact that this is not a criminal statute, * * * in view of the grave nature of deportation * * * we shall * * * test this statute under the established criteria of the 'void for vagueness' doctrine" (341 U. S. at pp. 230-231).[52]

Mr. Justice Jackson, the only dissenter, disagreeing only as to the construction of the statute, but agreeing vigorously with the majority's doctrine, declared:

> "A resident alien is entitled to due process of law. * * * because of his (the deportee's) alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime" (341 U. S. at p. 243).

Thus, applying the "void for vagueness" doctrine in *Jordan,* this Court recognized the applicability in deportation of the basic premise that it is an "essential injustice" for the Government to inflict penalties without sufficient warning. Where as here there was no proscription of Communist Party membership as such at the time thereof, or any warning as far as innocent members were concerned that it might be in the category proscribed by law, there is an imposition of penalty with even less warning than in the case of a vague statute. Though it is true that the statutes then on the books subjected members of organizations advocating violence to deportation, this served as no notice to members who did not know of the Party's forcible purpose and who were not alerted to it

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[52] See *Harisiades,* 342 U. S. at p. 593, where the Court apparently recognized this limitation on deportation statutes. Compare *Weiman* v. *Updegraff,* 344 U. S. 183, 192, as to the necessity for notice that an organization is proscribed; also *Garner* v. *Los Angeles Board,* 341 U. S. 716, 721.

by judicial action or otherwise. For such members, there were no "facts from which common experience showed that the consequences"[53] of deportation would follow from their membership. It was not a case of "the actor [knowing] the consequence will follow and he may be liable for it even if he regrets it"[54] but of his having no reason to know a detrimental consequence would follow.

When petitioner allegedly joined the Party in 1945 or 1946, he had no reason to know or any warning that such membership could result in the harsh penalty of deportation. Three years after he had abandoned whatever membership he possessed, he is subjected by the instant statute to being cast forth from his home of 35 years' standing, for this membership. For petitioner and the large group of aliens subject to deportation under this statute who are like him, it is entirely retrospective and unfair as here interpreted, and violates the due process guarantee of the Constitution.

E. The Statute Should Be Construed as Ordering the Deportation of Past Members Only if They Knew of the Party's Advocacy of Violence.

In *Garner* (discussed supra, p. 37), a statute barring past members of organizations advocating violence from Government employment, was saved from doubt of its constitutionality by construing it to apply only to members who knew of the organization's advocacy of violence. See also *Gerende*, *Adler* and *Weiman* discussed supra.[55] We submit that the instant statute must likewise be construed

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[53] *Abrams* v. *United States*, 250 U. S. 616, 626 (Justice Holmes dissenting), cited with approval in *Dennis*, 341 U. S. at p. 515.

[54] *Ibid.*

[55] In *Gerende* and *Adler*, the statutes had been interpreted by State courts or officials as applying to knowing membership. In *Garner*, this Court relied on the assumption that such an interpretation would be made. In *Weiman*, the statute had been interpreted to the contrary and was therefore held unconstitutional.

to refer only to knowing members in order to avoid constitutional doubt. Reading the instant statute as ordering deportation only if the alien knew of the Communist Party's subversive purpose, would go far to give the statute a reasonable relation to the Constitutional purpose of the deportation power (see supra, pp. 27-34) to free it from arbitrariness (supra, pp. 35-38), to diminish its restraining effect on First Amendment rights (supra, pp. 38-40), and to cure it of the vice of retrospectivity (supra, pp. 40-42).

Further, the statute itself gives evidence that it was intended to be so read. For Section 2 of the Internal Security Act of 1950 specifies as the danger "those individuals who knowingly and wilfully participate in the world Communist movement" (Section 2(9)). Certainly Congress could not have intended to include for deportation those who were not, even in the past, wilful and knowing participants. Furthermore it is to be observed that the deportation provision includes not only members of the Communist Party, but of the Communist Political Association; in the latter case, even more than the former, it is inconceivable Congress intended that endorsement of subversive purposes be imputed, regardless of *scienter*, to all members of the organization. Finally, in discussing the intent of the legislation Senator McCarran, its sponsor, stated that Congress had intended the Act to be construed in accordance with the construction of the previous deportation acts, and quoted in particular the following language from *Colyer* v. *Skeffington*,[56] which had interpreted the original 1918 Act:

> "'Congress could not have intended to authorize the wholesale deportation of aliens * * * who are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.'" [57]

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[56] 265 Fed. 17, 72 (D. Mass.), reversed on other grounds sub. nom. *Skeffington* v. *Katzoff*, 277 Fed. 129 (C. A. 1).

[57] 97 Cong. Rec., Part 2, p. 2373 (March 14, 1951).

And it is to be noted that under the authoritative ruling on the 1940 Act, which was the amendment to the 1918 Act immediately preceding the instant statute, an alien without *scienter* was not deportable, because cooperation in the organization's unlawful purposes and thus necessarily knowledge of them, was held to be a component of "membership" or "affiliation." See *Bridges* v. *Wixon*, discussed supra, p. 20.

The Government referred in its brief in opposition to the instant petition for certiorari to the difficulties of proof unless past membership in the Communist Party were considered a conclusive cause for deportation. In all the cases involving membership in proscribed organizations (discussed supra, pp. 35-37), this Court has ruled that the statutes only covered knowing membership, and it has not been suggested nor demonstrated that efficient administration was defeated by this requirement. Certainly the security of public employment from subversion, at issue in those cases, is of equal importance with the deportation of aliens. And it would of course be fanciful to suppose that proof of knowledge would involve subjective probing of the mind; it would, as in the numerous instances throughout the law where *scienter* is required, depend on objective facts [58] of the same type that would be involved in showing membership itself. We concede that fair and rational laws may be somewhat more cumbersome than a streamlined dictatorial system; but if this were a reason to eliminate elements vital to a reasonable criterion of deportability, the statute should be reduced to some such simplified test as a provision for deportation of anyone who had been seen at a Communist sponsored meeting.

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Besides the grounds already argued for holding the statute unconstitutional as here interpreted, we submit that in that it is not a reasonable method of ridding the country

[58] See *American Communications Ass'n* v. *Douds*, 339 U. S. 383, 411.

of undesirable residents, it should be deemed a violation of the substantive guarantee of due process of law. For, while we do not doubt this Court's statement in the *Harisiades* opinion that it could not "equate our political judgment with that of Congress" (342 U. S. at p. 590), we do not believe that opinion precludes the limited judicial consideration of the reasonableness of the legislative judgment which is guaranteed by due process (see 342 U. S. at p. 591).

Though the power to deport is considered in part to be implied from sovereignty, the fact that sovereignty is the source of a power does not free it from the limitation of due process when it is used in relation to domestic problems.[59] Thus, the war power, which likewise stems in part from sovereignty, is unlimited by due process if exercised against other sovereignties and for external purposes.[60] But if exercised against residents to accomplish a purpose relating to internal affairs, the constitutional due process limitation is fully applicable.[61] In enacting the Internal Security Act, it is clear from the Act's findings and very title that Congress was not concerned with other sovereignties or with this country's external dealings. Congress obviously realized, as Mr. Justice Jackson has said, that dealing with alleged subversives in this country, whether citizen or alien, is "our problem";[62] the deportation pro-

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[59] Insofar as the power to deport aliens is implied from the power granted by the Constitution over naturalization, it stems from a power to regulate the role of aliens in domestic affairs; and it seems generally assumed that from this aspect it is no more free from the restraint of due process than other regulations of resident aliens.

[60] See *Ex Parte Quirin*, 317 U. S. 1.

[61] See *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426, 447-448; *Hirabayashi* and *Endo* cases, cited supra, p. 23.

[62] *United States* v. *Spector*, 343 U. S. 169, 180. Compare suggestion by President's Commission on Immigration and Naturalization that no alien be deported who was lawfully admitted before the age of 16 or who has been admitted for over 20 years. *Report*, cited supra note 24, at p. 202.

visions are clearly part of the regulation of this domestic problem, of concern to this country alone.

That international law does not impose a due process standard upon our power to deport is immaterial. For international law only insures those very minimal standards of treatment which have received the consent of all nations,[63] and its standards can only be advanced by the more advanced nations acting as bellwethers. By virtue of our Constitution, our Government functions under a far higher standard than that imposed by international law. Observance of due process as a limitation on its deportation power would be in no way novel; the Constitution already curtails in other respects the more despotic freedom the Government would enjoy under international law with respect to the treatment of resident aliens.[64]

III. The provision for deportation of persons who have at any time in the past been members of the Communist Party violates the constitutional guarantee of due process of law in that it substitutes legislative fiat for the hearing ensured by the guarantee.

For the first time in the history of the deportation law, it departs from the tenet that it is the legislative function to adopt policies and principles of general applicability; for the first time Congress has instead proscribed from continued residence and imposed the harsh penalty that is

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[63] See 1 *Oppenheim's International Law* (4th Ed., McNair, 1928), p. 17, *The Antelope*, 10 Wheat. 66 (by Marshall, C. J.).

[64] Many of the rights now accorded to aliens under due process and equal protection on the basis that these clauses protect all residents, are not insured to them by international law. Compare cases cited supra note 48; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33, and *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410; with Fenwick, International Law (rev. ed.) 192; Borchard, Diplomatic Protection of Citizens Abroad (1915) 43.

"the equivalent of banishment or exile" [65] on members of a particular organization. Such special legislation is contrary to our fundamental concept of the legislative function and of due process of law. For "Law * * * must not be a special rule for a particular case, but * * * 'general law, a law which hears before it condemns * * *'" *Hurtado* v. *California*, 110 U. S. 516, 535. Semble: 2 Cooley, Constitutional Limitations (1927, 8th ed.) 809.

When the bill designating Harry Bridges for deportation was debated, Representative Hobbes, though favoring his deportation, opposed the bill on the ground it "frankly transgresses one of the cardinal principles which our founding fathers would have died to preserve inviolate." [66] Similarly, the then Attorney General Jackson declared that the bill "would be an historical departure from an unbroken American practice and tradition." [67] So too in 1948, testifying on a bill that was a predecessor of the Internal Security Act, the then Attorney General Clark pointed out: "singling out a political party or group for prohibitive legislation * * * may be * * * objectionable as special legislation." [68]

The vice of the instant statute is not, however, merely that the legislature has undertaken to specify the organization whose members are to be penalized. If the statute only related to present members of the Communist Party, it would more nearly resemble an adoption of policy, and thus appropriate legislative action, in that it would at least in a sense establish a rule for the present and future as to Party membership. Here, however, the Legislature has in effect made an adjudication as to the character of the Communist Party, and as to the undesirability of aliens

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[65] *Delgadillo* v. *Carmichael*, 332 U. S. 388, 389.

[66] Quoted in note, 52 (1942) Yale Law Journ. 108, 116.

[67] Sen. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9.

[68] Hearings before Subcommittee on Legislation, Committee on Un-American Activities of House of Representatives (80th Cong., 2d Sess.) (Feb. 5, 1948), p. 20.

because of their Party connection, at any and all times during the past thirty-five years of its existence in this country.

By erecting a conclusive presumption as to membership in the Communist Party at all times in the past, the Act deprives the alien of his right under due process to a determination of his deportability by a fair procedure and a fair hearing. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-50. For he gets a hearing only as to whether he was a member of the proscribed organization; he gets no hearing on the existence of the fact which is the supposed basis for inferring his undesirability: the organization's advocacy of violent overthrow during his membership.

The situation seems indistinguishable from that in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. There the Attorney General had determined, on the basis of reports and studies, but without a hearing, that various organizations could properly be deemed "communist"; in subsequent loyalty proceedings against Federal employees, while the employee would have a hearing to determine whether he was a member of these organizations, there would be no hearing as to the character of the organization, the Attorney General's determination being conclusive in this respect. Despite the minimal constitutional protection traditionally afforded Government employees as to discharge (see supra, p. 36), all the majority Justices who considered the proceedings against the employees believed that their right to a hearing would be nullified if the Attorney General's fiat were to be conclusive of the character of the organizations (341 U. S. at pp. 178, 184-185; and see p. 173). Even the dissenting Justices made it clear that they would consider the Attorney General's designation a violation of due process if membership in a "communist" organization were to be a conclusive reason for discharge (341 U. S. at pp. 205, 207, 209). Thus, it is clear that the Court as a whole would have considered the employee de-

prived of due process if the only issue on which he had a hearing was his membership in the designated organization, as under the instant deportation provision.[69]

The instant statute clearly presents an equal violation of due process to that involved in the *Joint Anti-Fascist* case; here the character of the organization is established by fiat not only for the present but for the past 35 years, and a deprivation far more serious than loss of employment,—indeed in which loss of employment is only a minor element,—is inflicted. The more serious the deprivation, the more important are the procedural safeguards. *Bridges* v. *Wixon*, 326 U. S. 135, 154.

A statute involving a similar procedural problem to the instant one was likewise presented to this Court in *United States* v. *Spector*, 343 U. S. 169. There the statute imposed a criminal penalty upon aliens against whom there were deportation orders, who did not make arrangements to depart. While the majority reserved decision on the question, it gave some indication that the alien could not be foreclosed from a determination in the appropriate tribunal of all the elements that would properly be involved in his guilt, including the validity of the deportation order (343 U. S. at pp. 172-173). Mr. Justice Jackson, dissenting, thought it clear that the statute precluded judicial trial of that issue and he therefore faced squarely the question reserved by the majority. He said:

> "If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom." 343 U. S. at pp. 177-8.

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[69] And see *Weiman* v. *Updegraff*, 344 U. S. 183, 192.

There the alien's right to a judicial trial, which he possessed because the penalty was criminal, would have been violated in that part of the determination of his guilt was relegated to an administrative determination; here the right to an administrative hearing, which he possesses because the penalty is deportation, is violated in that a vital element as to his deportability is subtracted from administrative consideration and determined by legislative fiat. And here too a broader principle than the law applicable to the deportation of aliens is involved. If, without adversary proceedings and on a mere legislative estimate of probabilities, Congress can depart from its customary policy-making role and make determinations as to particular individuals and organizations, the constitutional separation of powers and the protection of due process will be lost. If Congress can by fiat establish the facts that have traditionally been established by quasi-judicial proceedings, and that can only appropriately be so determined,[70] the major protection afforded to every person by due process, a fair and reasonable determination of the facts, will be abandoned.

Here determination by fiat is particularly obnoxious because Congress has in effect made an adjudication of facts as to the character of the Communist Party at any and all times for the past thirty-five years. Even when this Court was concerned with the determination of general social conditions for a past period, rather than the character of a particular organization, it remanded the case for the taking of evidence in the lower court; it held that though a

[70] As to the Constitutional necessity for a quasi-judicial hearing in determinations as to specific individuals or organizations, see *Interstate Commerce Commission* v. *Louisville and Nashville R.R. Co.*, 227 U. S. 88, 93-94; *Morgan* v. *United States*, 304 U. S. 1, 14, 18-19. And the hearing requirement cannot be avoided merely by making a determination of facts as to a group, preliminary to enforcement proceedings against its members. Compare *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *Bowles* v. *Willingham*, 321 U. S. 503, 519-521.

"declaration * * * by the legislature so far as it relates to present facts" is entitled to "respect", when the situation at various past times is material, "the facts should be accurately ascertained and carefully weighed." *Chastleton Corp.* v. *Sinclair*, 264 U. S. 542, 549 (per Holmes, J.). "Legislative fiat" cannot here be permitted to take "the place of fact." [71]

The Government has suggested in support of the instant provision that Congressional committees in 1931 and 1935 had concluded that the Communist Party then advocated violent overthrow of the Government. It is to be noted that the findings in the instant Act only relate to the present, and the Committee conclusions mentioned by the Government would hardly account for the 35-year coverage of the instant provision.

But in any event we regard these Congressional reports as of no materiality. It is appropriate and necessary for Congress in the legislative process to base its judgment on whatever material it chooses, and it is not the province of the courts to consider the proceedings by which it arrives at its judgment. Indeed, this is one of the major distinguishing features of the legislative process. The Government's theory would mean that in place of a determination of facts by a fair judicial or quasi-judicial procedure, the legislature can ordain them conclusively, with the courts merely determining whether there were materials Congress had, or could have had, before it which support its view of the facts. Due process of law under this system would not exist whenever Congress chose to itself make the determination, on a mere estimate of the probabilities without adversary proceedings.

As to the Government's attempt to support this unprecedented type of legislation on the argument that it

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[71] *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642. Semble: *Manley* v. *Georgia*, 279 U. S. 1, 6. Compare, *Stack* v. *Boyle*, 342 U. S. 1, 6.

lessens the administrative burden, it hardly seems necessary to say that administrative convenience cannot be allowed to dilute Constitutional rights absent a showing of actual administrative impossibility and emergency [72] such as has not and cannot be made out here. And it may be noted that expedients less destructive of procedural rights than the use of legislative fiat could be adopted. See for example, the procedure specified in other sections of the Internal Security Act for administrative hearings to determine the character of organizations. (See Title I of Act.)

As Justice Frankfurter declared in concluding that the Attorney General's fiat as to "communist" organizations was violative of due process:

> "Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." (*Joint Anti-Fascist* case, 341 U. S. at pp. 173-174).

Here as there the case has no square precedent, because Congress has never before attempted to by-pass procedural protections, and impose a penalty on membership in a designated proscribed group. As the Senate Judiciary Committee said: "This provision is new and is designed as a direct identification and proscription of such [the identified] aliens as subversive." [73] In establishing this novel proscription, we submit that Congress violated the guarantee of due process.

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[72] Compare *Hirabayashi* and *Korematsu* cases, supra, p. 23.

[73] Sen. Rep. 2230, 81st Cong., 2d Sess., p. 6; repeated in Sen. Rep. 2369, 81st Cong., 2d Sess., p. 6, accompanying S. 4037, the immediate antecedent of the Internal Security Act.

IV. The statute as here interpreted violates the constitutional prohibition of bills of attainder and ex post facto laws.

The question of whether a deportation statute is a bill of attainder has never before arisen because there has never been a statute which imposed deportation on a designated group for their past conduct. The instant statute singling out a named class of persons and imposing a penalty on them for past conduct, is typical of a bill of attainder. For it not only designates the group on whom the penalty is to fall, but, as in previous statutes held to be bills of attainder, "the basis of disqualification was past action * * * [so that] nothing that those persons proscribed by its terms could ever do would change the result." (*American Communications Assn.* v. *Douds*, 339 U. S. 382, 414).

The fact that deportation is considered a civil rather than a criminal sanction and, when legitimately imposed, is not deemed a punishment, in no way contradicts the conclusion that the instant statute is a bill of attainder. For, all the statutes which this Court has held to be bills of attainder have imposed civil sanctions (See *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234; *United States* v. *Lovett*, 328 U. S. 303); nor has this Court suggested in the recent cases where it has considered the attainder question that the civil nature of the statute affected its determination (See *American Communications Assn.* v. *Douds*, loc. cit. supra; *Garner* v. *Los Angeles Board*, 341 U. S. 716, 721-722). And in all the instances of bills of attainder, the statute purported to be, like the instant one, a regulatory measure directed at remedying or preventing some current or future evil. Thus, in the classic *Cummings* case, where the statute imposed a disqualification for various occupations and offices on those who had supported the Confederacy in the Civil War, it was argued that such past con-

duct was an appropriate test of present qualification to engage in those positions and occupations in that it would avert the danger of future disloyalty to the Government (4 Wall. at p. 320; and see dissenting opinion at p. 386). The holding that the statute was a bill of attainder was based on the court's conclusion that the proscription, though alleged to be a reasonable qualification, had no real relation to fitness, and therefore, though in the guise of a qualification for the positions, must be deemed a punishment (4 Wall. at pp. 319-320). Semble: *Garland, Pierce* and *Lovett,* cited supra. Thus, in *Dent* v. *West Virginia,* 129 U. S. 114, the court explained *Cummings* and *Garland* as follows (at p. 126):

> "As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that there was no way of inflicting punishment except by depriving the parties of their offices and trusts."

See similar discussion in *Hawker* v. *New York,* 170 U. S. 189, 198.

Accordingly, in discussing this group of cases, this Court said recently:

> "Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.'" Garner v. Los Angeles Board, 341 U. S. 716, 722.

And the determining circumstances, under the decided cases, is whether the deprivation has a genuine relation to an alleged evil, or whether the allegation of a relationship is merely a rationalization and a gloss for what is in truth punitive.

As we demonstrated in Point II of this brief, the instant statute as it has been here interpreted is not reasonably related to the alleged evil and to the only purpose for which deportation can constitutionally be imposed: ridding the country of undesirable residents.[74] Thus, as in the previous attainder cases, the allegation that the proscription of the designated group is necessary for security must be treated as insubstantial and their deportation deemed a punishment for their past acts.

The penalty here involved is indubitably far graver than that involved in any of the previous attainder cases, for deportation is a conglomerate deprivation of the most vital privileges: of residence, family unity, livelihood; and since the statute as here interpreted imposes this penalty punitively, is must be held a bill of attainder.

Violation of Prohibition on *Ex Post Facto* Laws

Like the prohibition on bills of attainder, the related prohibition on *ex post facto* laws also applies to statutes imposing civil sanctions which are deemed, because of their lack of relationship to the evil they are alleged to remedy, to be disguised methods of punishment. See *Cummings, Garland, and Carskadon*, cited *supra*. Since the instant statute as here interpreted must be deemed punitive, and since it imposes punishment after the fact for acts that were innocent and apparently free from penalty when they were done, it is *ex post facto*.

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[74] It is interesting to note that in the *Cummings* case as here, the chief factors rendering the proscription unreasonable and punitive were its extreme retrospectivity, and its failure to distinguish between innocent and malicious activity. The Court pointed out, as to the vices of the *Cummings* proscription:

> "In the first place, it is retrospective; it embraces all the past from this day; and if taken years hence, it will also cover all the intervening period. * * * And * * * it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship" (4 Wall. at p. 318).

In the *Harisiades* opinion this Court indicated it might be appropriate to consider the *ex post facto* clause applicable to the penalty of deportation, but that it regarded the question as closed by the decisions in *Bugajewitz* v. *Adams,* 228 U. S. 585, and *Mahler* v. *Eby,* 264 U. S. 32. We submit however, that in neither case was the Court considering the possibility of a deportation statute that was unrelated to the Constitutional objective of the power and was for that reason to be deemed punitive. In each case the Court was only considering the applicability of *ex post facto* from the purely temporal standpoint: that is, in *Bugajewitz,* whether an alien could be deported on a basis that was not a cause for deportation at the time of his entry and in *Mahler,* whether conduct which was not a cause for deportation at the time thereof could be taken into account in determining an alien's undesirability for residence at the time of deportation. The Court's statements as to *ex post facto,* based on the assumption that deportation was not a punishment, were not, we believe, meant to contradict the holdings of the *Cummings* line of cases that *any* deprivation, imposed without justification could be considered punitive and *ex post facto;* indeed, in *Mahler* (264 U. S. at p. 39), the Court cites the *Hawker* case which discussed this doctrine. When it stated deportation was not a punishment, we submit the Court only had in mind legitimate uses of the deportation power.[75]

The theory that deportation statutes are in any event "exclusively civil in nature, with no criminal consequences or connotations * * * has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been

[75] Thus, in *Mahler,* the Court pointed out that Congress "was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." (264 U. S. at p. 39). And in *Bugajewitz,* the Court justified the deportation, saying: "We must take it, at least that she [the deportee] is a prostitute now." (228 U. S. at p. 590).

added and the period within which deportation proceedings may be instituted has been extended." (*United States* v. *Spector,* 343 U. S. 169, 178, Justice Jackson dissenting.) But in any event, whether ordinarily deemed civil or criminal, we submit that the doctrine of the *Cummings* line of cases, recently reiterated in this Court's opinion in *Garner* (quoted supra p. 54), is applicable to the instant statute and that it is accordingly a violation of the *ex post facto* clause.

CONCLUSION

Though upholding the deportation statute prior to the addition thereto of the instant provision, this Court pointed out that it "stands out as an extreme application of the expulsion power" (*Harisiades,* 342 U. S. at p. 588). The instant statute, as it was here interpreted, is an even more extreme example, adding additional vices to the cumulation of those in the previous law; it "would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute" (*Stack* v. *Boyle,* 342 U. S. 1, 6), and it would have a "disastrous effect on the reputation of American justice" (*Williamson* v. *United States,* 184 F. 2d 280, 284 (C. A. 2, 1950) Justice Jackson sitting as Circuit Justice).

The decision of the Court below therefore should be reversed; the deportation order should be held void; and the statute as here interpreted held unconstitutional.

Respectfully submitted.

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December, 1953.

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APPENDIX

Originals of the following documents on file in Office of the Clerk of this Court

Supreme Court of the United States

OCTOBER TERM, 1953

No. 407

ROBERT NORBERT GALVAN,

Petitioner,

v.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INDEX

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REPLY BRIEF FOR PETITIONER

I

A. We have argued in our main brief that the Internal Security Act of 1950 must be read as imposing deportation on past members of the Communist Party only if they knew during their membership that it had the objective of overthrowing the Government. The Congressional purpose for the Act to be so construed was evidenced, *inter alia*, by the statements of the Act's sponsor to this effect and by Congress' intention to use the term membership in the same sense as in the previous deportation law; the 1940 statute, which was the amendment to the deporta-

tion law immediately preceding the instant Act, had been construed by this Court as referring to a knowledgeable connection with the Party. *Bridges* v. *Wixon*, 326 U. S. 135 (see discussion in petitioner's main brief, pp. 42-44). The Government seems unable to explain away the statements of the Act's sponsors as to its intended coverage[1] and entirely ignores the interpretation of the 1940 Act in the *Bridges* case, citing instead a few lower court decisions under prior Acts (see Brief for the United States in *Harisiades*, pp. 43-44). In fact, however, in the great majority of lower court cases even prior to this Court's *Bridges* decision, knowledge was treated as material; and though it is true that in a few of the opinions cited by the Government there were statements to the contrary, in every case but one, the courts took into account that the deportable alien had had knowledge, and had indeed, concurred, in the Party's aim of overthrow at the time of his membership.

Thus, in *Ex parte Vilarino* and *In re Saderquist*, cited by the Government (Harisiades brief, p. 43), the respective courts pointed out that Vilarino, whose Communist Party membership book said he " 'entered Revoluntionary Movement: 1907' ", "was aware of his Party's teaching" (50 F. 2d at p. 586), and that Saderquist understood "the doctrine of the Communist Party * * * (to consist of) the revolutionary views of the Communist International" (11 F. Supp. at p. 526). Similarly, in *Kjar* v. *Doak*, cited by the Government (Harisiades brief, p. 44),

[1] See Respondent's brief in instant case, pp. 67-68, incorporating by reference its argument in *Harisiades* v. *Shaughnessy*, Oct. Term, 1951, Nos. 43, 206, 264; see Brief for United States in *Harisiades* case, pp. 45-57, as to legislative history.

the Court pointed out that the alien subscribed to Communist Party principles and that, even conceding the correctness of his interpretation of these principles, it was engaged in the advocacy of unlawful violence (61 F. 2d at p. 586). The sole case of those cited by the Government in which knowledge was in fact disregarded is the *Greco* case (Harisiades brief, p. 44),[2] and even there the Court noted that the alien testified he was "loyal to" and a "good member" of the organization there in question (the Trade Union Unity League) (63 F. 2d at p. 864)—a circumstance giving rise to an inference of knowledge.

And contradicting the Government's argument as to the course of decision in the lower courts under previous deportation acts, are the numerous decisions not treated in its brief, in which the courts assumed the materiality of knowledge and emphasized, in holding the alien deportable, his personal knowledge and endorsement of the Party's subversive aim during his membership. *Branch* v. *Cahill*, 88 F. 2d 545, 546 (C. A. 9, 1937); *Fortmueller* v. *Commissioner*, 14 F. Supp. 484 (S. D. N. Y., 1936); *Lisafeld* v. *Smith*, 2 F. 2d 90, 91 (W. D. N. Y., 1924); *United States* v. *Wallis*, 268 Fed. 413, 415 (S. D. N. Y., 1920). And see *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2, 1935) discussed in petitioner's main brief, p. 21.

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[2] A similar opinion cited by the Government (*Harisiades* brief, p. 44) was rendered by the District Court in the *Bridges* case, but this decision was reversed in this respect in *Bridges* v. *Wixon*, 326 U. S. 135. The Government also cites (*Harisiades* brief, p. 43) *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1), but there the Government had not appealed from the District Court's ruling that innocent members were not deportable (see *Harisiades* brief, p. 46, note 26), and the only issue presented or discussed on appeal was whether the Party advocated violence.

Thus, if the lower court decisions are to be taken into account in considering the intended construction of the instant Act, we find that the bulk of them do not support the Government's position. And in any event it is clear that none of the decisions dealt with membership during a period such as the early 1940's when the Communist Party was affirmatively supporting this Government, nor did any of them envisage disregard of knowledge in the case of such a member. Nor was such membership involved or envisaged in this Court's opinion in the *Harisiades* case. Membership during such a period is, however, a crucial consideration in the instant case; for petitioner, if he joined the Party at all, was a member during or directly following the Party's Win-the-War era, and it is likely that a large number of the other aliens deportable under the instant statute were members only during that or a similar interval (see our main brief, pp. 29, 33-34, and discussion infra, p. 5).

B. Whether the *Harisiades* case was, as the Government maintains, presented to this Court on the basis that knowledge was immaterial, is a difficult question. While there are some statements in the *Harisiades* brief to this effect, on the other hand, the Government, unable to refute the statements of the Act's sponsor that it was intended to refer only to knowing membership, argued that the aliens involved in *Harisiades* were deportable because of their knowledge of the Party's aim of overthrow (Harisiades brief, pp. 45-49).

For a rational construction, it is more essential to read the instant statute as requiring knowledge than it was in the case of the statute involved in *Harisiades;* for under that statute the alien was deportable only if it were

found that he belonged to the Communist Party at a time when it advocated violent overthrow of the Government. If, however, the instant statute were construed to preclude the knowledge requirement, the alien could be deported though he was a member of the Party only during a period when it was affirmatively supporting this Government and though he did not know overthrow had been or was to be its program. A sophisticated historical perspective as to the Communist Party cannot be assumed on the part of an alien joining in response to such appeals as those set forth in the Appendix to our main brief.

And no documentation, but mere recollection, is required to establish that, particularly during the war-time alliance with Russia, the manifested spirit in official Washington, demonstrated by public testimonials to Soviet-American friendship and such acts as the pardon of Earl Browder, was friendly toward Russia and tolerant to the Communist Party, whatever may have been the prescient suspicions among "some in the highest quarters" (Resp. Br. 62). As pointed out in our main brief (pp. 29, 33-34), since the Party had its highest membership during the Soviet-American alliance, and petitioner, assuming arguendo he joined the Party, was a member during or directly following this period, it would on this ground alone be against reason to assume that he or many of those deportable under this Act had knowledge that the Party had a subversive, in addition to its "progressive," aim.[3]

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[3] The Government, attempting to depreciate (Resp. Br., p. 24, note 14) the force of this Court's decisions holding it unreasonable and arbitrary to fail to differentiate between innocent and knowing membership (discussed in petitioner's main brief, pp. 35-38), states that the statutes involved in those decisions related to "front" organizations as well as the Communist Party itself. But the subject

II

A. The Government, disregarding the emasculation of due process resulting from the Congressional practice of proscribing a specific group, as in the instant Act (see petitioner's main brief, pp. 47-51), argues that Congressional proscription of persons who were members of the Communist Party at any and all past times is justified largely because there were statements by Congressional committees in 1931 and 1935 that the Party then advocated violent overthrow (Resp. Br. 40-42), and because there were some lower court decisions that findings of advocacy of violence by the Communist Party in various years, were supported by evidence (Resp. Br. 51). But these decisions were merely on particular submissions of evidence at particular times and are no basis for establishing a conclusive presumption as to the Party's character for all past times. As pointed out in our main brief (p. 31), courts of equal authority to those cited by the Government came to the contrary conclusion.[4] But even giving weight to the decisions cited by the Government and even assuming that the Party's character during all the years listed in the Government's brief was therein considered (though in fact it was not[5]), it is important to

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of the proscription in those cases was membership in organizations advocating violent overthrow of the Government, a category which, if including organizations other than the Communist Party, would include equally dangerous organizations.

[4] Respondent's note as to the status of findings by the immigration officials on the nature of the Party (Resp. Br., note 39, p. 54) must be read in a qualified light in view of these decisions.

[5] In *Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2, 1951), for example, though the alien was a member of the Party from 1925 to 1939, the period noted in the Government's brief, the Court did not need to, and did not consider whether the Party advocated violence during this entire time.

note that there are no Congressional declarations nor court decisions as to 1941 to 1945, which was the time of the Party's highest membership, and the period which would have influenced petitioner if he in fact became a member. Further, it is for the previous decade, the 1930's, in which the membership was near its peak, that there are court holdings contrary to those cited by the Government. Thus, the possibility that aliens deportable under the instant Act could prove that the organization did not advocate overthrow of the Government at the time of their membership is far from the academic proposition that the Government pictures. And we wish to emphasize, contrary to the Government's implication (Resp. Br. 40, 50), that all the findings in the Act relate to the danger from those presently active in the Party; there is no reference in the findings either to the character of the Party in the past or to any danger from past members. The Government's brief is likewise directed in major part to the present character of the Party (Resp. Br. 44-50, and note 38, p. 53).

B. In all events, however, we regard the presence or absence of Congressional study, deliberation, or findings as immaterial (cf. *Lyons* v. *Wood*, 153 U. S. 649; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152). We maintain that Congress cannot make what is in its essential nature a quasi-judicial determination, by legislative fiat; if it could substitute the legislative process for the judicial or quasi-judicial because it had a reasonable basis for its conclusion, the due process guarantee of a fair hearing would be destroyed (see petitioner's main brief, pp. 46-52). The guarantee cannot be avoided by changing

the forum of decision. See *Prentis*, 211 U. S. at p. 227. And the argument of administrative convenience cannot prevail over the need for basic fairness and just procedure. Compare *Estep* v. *United States*, 327 U. S. 122; *Gibson* v. *United States*, 329 U. S. 338.

The Government's attempt to show that the instant Congressional mandate to deport members of a specified organization is not unprecedented, by citing the much-criticized and now repealed statute for the deportation of Chinese and the provision respecting anarchists, does not seem persuasive. The Chinese deportation law was based and validated on an assumption of general racial peculiarity and inferiority (see quotation from *Fong Yue Ting* v. *United States*, Resp. Br. 55-56); Congress did not there, as it has here, enact into a conclusive presumption its determination as to the conduct and beliefs of a specific organization of identifiable individuals during past periods —a determination appropriate for and customarily made in quasi-judicial proceedings. As to the law for deportation of anarchists, this seems to us the customary type of proscription of aliens with certain convictions and we fail to see that Congress there assumed in any way the function of determining the characteristics of a specific organization and proscribing it, as it did in passing the instant Act.[6]

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[6] It seems clear that this Court did not express approval in *Tiaco* v. *Forbes*, 228 U. S. 549 (Resp. Br., p. 22), of the legislature's exercising power of this type, but merely approved a legislative grant of authority to the executive to determine which aliens were a menace to public order.

III

The Government's attempt to analogize to the Alien Enemy Act and the power over enemy aliens seems to us misplaced and dangerous. The alien enemy has a uniquely precarious status; he is not even entitled to the Constitutional right accorded other aliens to a hearing prior to his expulsion. See *Ludecke* v. *Watkins*, 335 U. S. 160, 171, and dissenting opinions therein. This drastic and arbitrary power which is in a sense a survival from a less humanitarian time (see *Ex parte Kawato*, 317 U. S. 69) is justified only on the basis that it relates to a special and narrowly defined category of person. To analogize from this power, and to stretch the concept of enemy out of its established confines would be to extend a unique rule into a general principle with the dangerous "'tendency of a principle to expand itself to the limit of its logic'." [7] Unless the line between war-time and peace-time governmental powers is preserved, emergency with the dictatorial powers appropriate thereto will become normalcy.[8] Whatever may be the treatment of aliens by other countries, our Constitution establishes with respect to the treatment of aliens in this country "a standard for our Government which the Constitution does not make dependent upon the standards of other governments." *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 492.

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[7] See quotation from Judge Cardozo in Justice Jackson's dissent in *Korematsu* v. *United States*, 323 U. S. 214, 246.

[8] See Justice Jackson's dissent in *Korematsu*, 323 U. S. at pp. 242-247, passim.

IV

Petitioner's counsel respectfully asks leave to call to the Court's attention a misstatement of fact, prejudicial to petitioner, in our main brief.[9] Instead of finding that petitioner was a member of the Communist Party from 1944 to 1948, as stated in the main brief (p. 4), the record shows that the Immigration Service found him to be a member only between 1944 and 1946 (T. 31-32).[10] This limited finding of membership shows the irrelevance of the Government's statement that "membership during that period (1946-1947) is sufficient under the statute" (Resp. Br. 77), since the administrators made no finding of such membership; and it likewise demonstrates the irrelevance of the Government's speculative suspicion that events in March 1947 (Resp. Br. p. 38, note 25) might have influenced petitioner's decision to leave the Party.

Further, the fact that petitioner was found to be a member only until 1946 shows that the Service discredited

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[9] The error in the main brief, which counsel greatly regrets, occurred because the record herein was not printed, due to petitioner's poverty; and present counsel, not having available during the preparation of the brief a copy of the administrative findings, assumed the accuracy of the statement regarding them in the Government's brief in opposition to the petition for certiorari, which was in fact erroneous.

[10] The hearing officer so found (T. 31-32); the Assistant Commissioner, making no express finding as to petitioner's period of membership, referred in his discussion of the evidence only to petitioner's alleged admission of membership from 1944 to 1946 and to his testimony that he last attended a meeting in January, 1947. The Board of Immigration Appeals merely found without specification of time or mention of evidence, that petitioner had been a member of the Communist Party. The decisions of the Assistant Commissioner and the Board have been filed with the Clerk of this Court.

the witness Meza,[11] on whose testimony the Government relies (Resp. Br. 72-78). Indeed, it is clear from this finding and the discussions of the evidence both by the hearing officer and the assistant commissioner that the deportation order rests exclusively on petitioner's purported admissions, already shown in our main brief (pp. 12-13) to furnish no support for the order. While it may be true that petitioner had no right to counsel at the preliminary examination where these "admissions" were made (Resp. Br. 75), we submit that the fact-finding administrative officials, if conscientiously attempting to insure him the fair hearing guaranteed by the Constitution, should have because of his lack of counsel been at particular pains to determine whether the "admisson" was a statement of the truth or a result of misleading questions. The Government's implication (Resp. Br. 74) that the administrators were entitled to hold against petitioner any statement he may have been led to make, without concern for its accuracy, shows no regard for their duty to properly and diligently perform their quasi-judicial function.

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[11] Meza's alleged conversation with petitioner as to his Communist Party membership took place, according to her testimony, after a Party meeting she alleged they attended in May or June, 1947 (T. 126-127), a date subsequent to the time of termination of petitioner's membership, under the Immigration Service's finding.

CONCLUSION

For the foregoing reasons and those discussed in our main brief, we again respectfully submit that the judgment of the Court below should be reversed; the deportation order should be void; and the statute as here interpreted held unconstitutional.

Respectfully submitted,

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NANETTE DEMBITZ,
Attorneys for Petitioner.

January, 1954.

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 6 Misc.

ROBERT NORBERT GALVAN, PETITIONER

v.

U. L. PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, SAN DIEGO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 27-34) is reported at 201 F. 2d 302.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1953 (R. 35), and a petition for rehearing was denied on March 9, 1953 (R. 36). The petition for a writ of certiorari was filed on May 25, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, making an alien's membership in the Communist Party at any time after entry grounds for deportation, is constitutional.

2. Whether the evidence adduced at the administrative hearings was sufficient to sustain the charge on which the order of deportation against petitioner was based.

3. Whether petitioner was given a fair and valid hearing.

STATUTE INVOLVED

As amended by Section 22 of the Internal Security Act of 1950, the Act of October 16, 1918 (40 Stat. 1012), as amended, provided, at the time involved in this case, as follows (8 U.S.C., Supp. V):[1]

§ 137. * * *

> Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * * (iv) the Communist or other

[1] The statutory provisions here involved were repealed by Sec. 403(a)(16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279) which recodified and reenacted these provisions without material change. See *id.*, Sec. 241(a), 66 Stat. 204.

totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state * * *;

* * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law: * * *;

(G) Aliens who write * * * any written or printed matter * * * advocating or teaching * * * (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; * * *;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter of the character described in subparagraph (G).[2]

§ 137-3. * * *

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the

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[2] The substance of subsections (F), (G), and (H) of 8 U.S.C. (Supp. V) 137 (2) was, at the time of the original warrant of arrest in the instant case, contained in 8 U.S.C. (1946 ed.) 137(c), (d), and (e). Subsection (C) derived from Section 22 of the Internal Security Act of 1950, 64 Stat. 1006.

classes of aliens enumerated in section 137 (2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

STATEMENT

Petitioner was born in Mexico on June 6, 1911, and is a citizen of that country (T. 174).[3] He first entered the United States on March 13, 1918, and has resided in this country since that time (T. 175). On March 17 and 31, 1948, petitioner was questioned under oath by representatives of the Immigration and Naturalization Service. Although fully warned that he was not required to make a statement and that any statement he made might be used against him, he testified fully and freely concerning his membership in the Communist Party from 1944 to 1946. He offered to rejoin the party and act as an agent for the Government to obtain information about it in exchange for the right to remain in this country. (T. 177-182.)

On August 13, 1948, a deportation warrant for the arrest of petitioner was issued, which charged that he was deportable in that he had been, after entry, a member of an organization which advocated violent overthrow of the Government, and of an organization distributing written matter so advocating (T. 168). This warrant was served on petitioner on March 10, 1949, and on that day a

[3] The record in the instant case is in two parts, the record of proceedings in the Court of Appeals, herein designated "R." and the record of proceedings in the District Court, herein designated "T."

brief deportation hearing, acquainting petitioner with the charges against him, was conducted at which petitioner was represented by counsel of his own choice. At the conclusion of the hearing, petitioner was released on bond (T. 68-76).

On January 12, 1950, a second hearing was conducted at which petitioner was again represented by counsel of his own choice (T. 78). At this hearing petitioner refused to answer any questions concerning his Communist connections on the ground that such answers might incriminate him. The statements which he had made in 1948 were admitted in evidence (T. 82). In addition, a former member of the Communist Party, Mrs. Jona Cooley Meza, testified that in 1946 she and petitioner had been members of a Communist Party unit, the Spanish Speaking Club Unit; that petitioner had attended meetings which were open only to party members; and that he had been elected to the office of Educational Director of the Unit (T. 110-127).

These hearings were rendered invalid by the decision of this Court in *Sung* v. *McGrath*, 339 U. S. 33, holding that the Administrative Procedure Act was applicable to deportation proceedings.[4]

On December 12, 1950, petitioner was given a *de novo* hearing, at which he was again represented by counsel of his own choice (T. 33). At this hearing, by agreement of the parties, the transcript of the hearings held on March 10, 1949, and January

[4] On September 27, 1950, Pub. L. 843, 81st Cong., 64 Stat. 1044, 1048, exempted deportation hearings conducted thereafter from the hearing provisions of the Administrative Procedure Act.

12, 1950, together with the exhibits, were "made part of the present hearing * * * to be used in determining the facts in this case" (T. 34).

Immediately thereafter, the examining officer lodged an additional charge against petitioner, that he was deportable under Section 22 of the Internal Security Act of 1950 (*supra,* pp. 2-4) in that he had been, after entry, a member of the Communist Party. The hearing officer asked petitioner's counsel whether, in view of the additional charge, he desired a continuance of the hearing for a period of five days, to which counsel replied that he did not (T. 36). At this hearing petitioner denied that he had ever been a member of the Communist Party, and attempted to explain away his 1948 statements. He said that he had not understood what the examining officer meant by "Communist Party," thinking that he was referring to other organizations to which he belonged and meetings which he had attended (T. 37-50).

On December 19, 1950, the hearing officer found that petitioner had been a member of the Communist Party from 1944 to 1948, and ordered his deportation on that ground (T. 31-32). On July 25, 1951, the findings and decision of the hearing officer were adopted by the Assistant Commissioner, and, on September 26, 1951, an appeal was dismissed by the Board of Immigration Appeals.

On December 17, 1951, petitioner filed in the District Court for the Southern District of California a petition for a writ of habeas corpus (R. 2-5). After a hearing (R. 11), the petition was

denied (R. 13-17). On appeal, the Court of Appeals affirmed the order of the District Court (R. 27-34).

ARGUMENT

1. Petitioner's principal contention is that Section 22 of the Internal Security Act of 1950, which provides for the deportation of past members of the Communist Party, is unconstitutional (Pet. 4-6). This question was briefed, though not decided, in *Heikkila* v. *Barber*, 345 U.S. 229, and *Martinez* v. *Neelly*, 344 U.S. 916 (see Gov't. Br., No. 426, O.T. 1952, pp. 16-36, and Gov't. Br., No. 218, O.T. 1952, pp. 63-70).

This Court, in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, upheld the constitutionality of Section 23(a) of the Alien Registration Act of 1940, 8 U.S.C. (1946 ed.) 137, as applied in requiring the deportation of aliens who, after entry, had been members of an organization advocating the overthrow of the Government of the United States by force and violence, namely, the Communist Party, even though there was no finding that the particular aliens advocated, or knew that the Communist Party advocated, such violent overthrow. The only difference between the presently pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is that the 1950 Act specifies membership in the Communist Party as a basis for deportation. This change, which obviates the burdensome necessity of proving anew in each individual case that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the

Government, was made only after the Senate Committee on the Judiciary had given long and continuous consideration to the nature and purposes of the Communist Party. The report of this committee accompanying the bill in which Section 22 originated concluded that "[a]s an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion." [5] S. Rep. 2230, 81st Cong., 2d sess., p. 10. The Committee also found that the Communist Party in the United States is foreign-dominated and that both its leadership and membership are "recruited overwhelmingly from alien ranks" (*id.*, p. 12). These findings as to the objectives, methods, and foreign domination of the Communist Party were set forth by Congress in Section 2 of the Act (64 Stat. 987-989), where in subsection (1) it is stated that the Communist movement is "in its origins, its development, and its present practice * * * a world-wide revolutionary movement" seeking by any means found necessary to establish Communist dictatorships throughout the world. Thus, the 1950 Act is, in effect, a legislative determination that the Communist Party has been and is an organization

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[5] Other congressional committees, at least since 1931, have consistently reached the conclusion that the Communist Party sought the overthrow of the United States Government by force and violence. See, for example, H. Rep. 2290, 71st Cong., 2d sess., pp. 65-66; H. Rep. 153, 74th Cong., 1st sess., pp. 12, 21.

dedicated to the forceful overthrow of the Government.[6]

This conclusion, when considered in light of this Court's decision in the *Harisiades* case, *supra*, holding that membership in an organization seeking the forceful overthrow of the Government, even though discontinued, is a legitimate ground for deportation, whether or not the alien knew of the organization's revolutionary objective, removes any serious question as to the constitutionality of Section 22 of the Internal Security Act of 1950. It is a reasonable exercise of the power of Congress to provide for the deportation of any class of aliens whose presence in this country may endanger its security.[7]

2. Petitioner's second contention, that the evidence was insufficient to sustain the charge that he was a member of the Communist Party of the United States from 1944 to 1948 (Pet. 7-9), is wholly devoid of merit. In his testimony of March 17 and 31, 1948 (T. 177-188), he freely admitted that he had been a member of the Communist Party, testified as to who had induced him to join and

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[6] This Court has on several occasions concurred in—or at least found that there was ample evidentiary support for—this conclusion as to the objectives and methods of the Communist Party in the United States. *Harisiades* v. *Shaughnessy*, *supra*; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 388; *Dennis* v. *United States*, 341 U.S. 494; *Carlson* v. *Landon*, 342 U.S. 524, 535-536.

[7] Compare Section 22 with the Alien Enemy Act of 1789 (1 Stat. 577), providing for apprehension and removal of aliens who are citizens of a foreign nation which threatens a "predatory incursion" against the United States. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160.

where he had joined, and gave other details. This testimony shows that he had joined the Communist Party and participated in its activities in San Diego, California.

Petitioner does not contend that this evidence was insufficient to show that he was a member of the Communist Party. Instead, he argues that because the Party was referred to as the "Communist Party," except in two instances where it was called the "Communist Party of the United States," the testimony was insufficient to prove that he was a member of the Communist Party of the United States. It is beyond conjecture that it is the Communist Party of the United States that operates in San Diego, California. But petitioner's argument would be baseless in any event; for membership in any branch or subdivision of the Communist Party, American or foreign, is grounds for deportation (see 8 U.S.C. (Supp. V) 137 (C)(iv), *supra*, pp. 2-3).

Petitioner's 1948 testimony was thoroughly corroborated by that of a former member of the Party, Mrs. Meza, who testified that she and petitioner had been members of the same Communist Party unit in San Diego, that petitioner had attended meetings which were open only to Party members, and that he had been elected to an office in the Unit. She also was acquainted with the same party members who had been mentioned by petitioner in his 1948 statement. Contrary to the statement in the petition (Pet. 7), Mrs. Meza testified that this unit, the Spanish Speaking Club, was a unit of the Communist Party (T. 110-127).

3. Petitioner's final two arguments relate to the alleged unfairness and impropriety of introducing a new charge at the hearing held on December 12, 1950, and of proving this charge by means of petitioner's testimony at previous hearings.

The regulations in force in December 1950, 8 C.F.R. § 151.2(d), authorized the lodging of additional charges if it developed during the hearing that there were grounds for deportation in addition to those contained in the warrant of arrest. Here, subsequent to issuance of the warrant of arrest, petitioner became subject to deportation because of membership in the Communist Party following enactment of the Internal Security Act of September 23, 1950 (64 Stat. 1006). When this charge, which was merely a more specific form of one of the original grounds, was lodged, counsel was advised by the hearing officer as follows:

> * * * In view of the fact that the Examining Officer has lodged this additional charge, I may inform you that you have the right at this time to request a further continuance of this hearing, which may be granted you to secure evidence to show cause why the respondent should not be deported upon this additional charge * * *, and I would like to ask you at this time if you desire a continuance [T. 36].

Petitioner's counsel unhesitatingly and unequivocally declined this offer (T. 36). It is clear that petitioner was not caught unprepared by the lodging of the new charge, and he cannot now claim that he was prejudiced thereby.

Similarly, there is no substance in petitioner's complaint that the record made at hearings held pursuant to the charges in the original warrant of arrest was improperly admitted in evidence at the December 12, 1950, hearing. No objection was made at the time. On the contrary, the transcripts were admitted by express agreement between the examining officer and counsel of petitioner's choice (T. 34). Petitioner does not suggest that there was any unfairness in the conduct of the prior hearings at which he had admitted his Communist associations; nor does he claim that the right to question him in rebuttal, which was reserved by counsel at the time of the agreement, was in any way restricted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1953.

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INDEX

284719—

CITATIONS

Miscellaneous—Continued

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OCTOBER TERM, 1953

No. 407

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v.

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12, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 22 of the Internal Security Act of 1950, providing for the deportation of aliens who have been members of the Communist Party at any time after entering the United States, is constitutional.

2. Whether the evidence adduced at the administrative hearings was sufficient to sustain the charge on which the order of deportation was based.

STATUTE INVOLVED

As amended by Section 22 of the Internal Security Act of 1950 (64 Stat. 1006), the Act of October 16, 1918 (40 Stat. 1012), as amended, provided, at the time involved in this case, as follows (8 U. S. C. 137, Supp. V):[1]

[8 U. S. C. 137]

* * * * *

> Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

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[1] These statutory provisions were repealed by Section 403 (a) (16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279), which recodified and reenacted these provisions without material change. See *id.*, Section 241 (a), 66 Stat. 204.

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * * (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state * * *;

* * * * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law: * * *;

(G) Aliens who write * * * any written or printed matter * * * advocating or teaching * * * (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; * * *;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter

of the character described in subparagraph (G).[2]

[8 U. S. C. 137–3] * * *

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 137 (2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

STATEMENT

Petitioner was born in Mexico on June 6, 1911, and is a citizen of that country (T. 174).[3] He first entered the United States on March 13, 1918, when he was six and one-half years old, and has resided in this country since that time (T. 175). On March 17 and again on March 31, 1948, petitioner was questioned under oath by representatives of the Immigration and Naturalization Service. Although fully warned that he was not required to make a statement and that any statement he made might be used against him, on both occasions he testified fully and freely concerning

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[2] The substance of subsections (F), (G), and (H) of 8 U. S. C. (Supp. V) 137 (2) was, at the time of the original warrant of arrest in the instant case, contained in 8 U. S. C. (1946 ed.) 137 (c), (d), and (e). Subsection (C) derived from Section 22 of the Internal Security Act of 1950, 64 Stat. 1006.

[3] The record in the instant case is in two parts, the record of proceedings in the Court of Appeals, herein designated "R." and the record of proceedings in the District Court, designated "T."

his membership in the Communist Party from 1944 to 1946. His testimony was that the last Party meeting he attended was about January 1947. He offered to rejoin the party and act as an agent for the Government to obtain information about it in exchange for the right to remain in this country. (T. 177–182.)

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On January 12, 1950, a second hearing was conducted at which petitioner was again represented by counsel of his choice (T. 78). At this hearing petitioner refused to answer any questions concerning his Communist connections on the ground that such answers might incriminate him. The two statements which he had made in 1948 were admitted in evidence, without objection, after the immigrant inspector who had

taken the statements testified as to the circumstances in which they were taken (T. 82). In addition, a former member of the Communist Party, Mrs. Jona Cooley Meza, testified that in 1946 she and petitioner had been members of a Communist Party unit in San Diego, the Spanish Speaking Club Unit; that petitioner had attended several meetings which were open only to Party members; and that he had been elected to the office of Educational Director of the Unit (T. 110–127).[4]

These hearings were rendered invalid by the decision of this Court in *Sung* v. *McGrath,* 339 U. S. 33, holding that the Administrative Procedure Act was applicable to deportation proceedings.[5]

On December 12, 1950, petitioner was given a *de novo* hearing, at which he was again represented by counsel of his own choice (T. 33). At this hearing, by agreement of the parties, the transcript of the hearings held on March 10, 1949, and January 12, 1950, together with the Exhibits (including the sworn statements petitioner made in March 1948), were "made part of the present hearing * * * to be used in determining the facts in this case" (T. 34).

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[4] The details of petitioner's membership in the Party are set forth more fully in Point II, *infra*, pp. 70 *ff.*

[5] On September 27, 1950, Pub. L. 843, 81st Cong., 64 Stat. 1044, 1048, exempted deportation hearings conducted thereafter from the hearing provisions of the Administrative Procedure Act.

Immediately thereafter, the examining officer lodged an additional charge against petitioner, that he was deportable under Section 22 of the Internal Security Act of 1950 (which became law on September 23, 1950) (*supra*, pp. 2–4) in that he had been, after entry, a member of the Communist Party. The hearing officer asked petitioner's counsel whether, in view of the additional charge, he desired a continuance of the hearing for a period of five days, to which counsel replied that he did not (T. 36). At this hearing in December 1950, petitioner denied that he had ever been a member of the Communist Party, and attempted to explain away his 1948 statements. He said that he had not understood what the examining officer meant by "Communist Party," thinking that he was referring to other organizations to which he belonged and meetings which he had attended (T. 37–50).

On December 19, 1950, the hearing officer found that petitioner had been a member of the Communist Party from 1944 to 1946, and ordered his deportation on that ground (T. 31–32). On July 25, 1951, the findings and decision of the hearing officer were adopted by the Assistant Commissioner, and, on September 26, 1951, an appeal was dismissed by the Board of Immigration Appeals on the ground that the evidence of record showed that, following his entry into the United States, petitioner became a member of the Communist Party of the United States.

On December 17, 1951, petitioner filed in the District Court for the Southern District of California a petition for a writ of habeas corpus (R. 2–5). After a hearing (R. 11), the petition was denied (R. 13–17). On appeal, the Court of Appeals affirmed the order of the District Court (R. 27–34).

SUMMARY OF ARGUMENT

I

Section 22 of the Internal Security Act of 1950, prescribing the deportation of past members of the Communist Party, is valid and applicable to petitioner.

A. As the Court has repeatedly held since 1893, Congressional decisions to deport classes of aliens are political determinations not normally reviewable by the judiciary. The legislative power is "plenary" (*Carlson* v. *Landon,* 342 U. S. 524, 534); the courts cannot intervene unless, perhaps, the action of Congress is a "fantasy or a pretense" or has "no possible grounds" to support it (*Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590). The authority and the responsibility belong to Congress, and this Court and the lower courts have consistently upheld and enforced expulsion laws which have seemed to many to be harsh, discriminatory, or unfair, because judges have no concern with the "wisdom", "policy", "justice", or "severity" of those measures. *E. g., Fong Yue Ting* v. *United States,* 149 U. S. 698; *Turner*

v. *Williams,* 194 U. S. 279; *Tiaco* v. *Forbes,* 228 U. S. 549; *Ludecke* v. *Watkins,* 335 U. S. 160; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. As against a legislative decree terminating their license to remain here, aliens (who have a divided allegiance and are not full members of the community) cannot call upon constitutional protections as broad as those available to citizens. Conversely, because the nation's policy toward aliens touches so directly upon the conduct of foreign affairs, the political branches have full sway.

B. The validity of Section 22 is directly supported, not only by these traditional principles, but also by the recent decisions in *Harasiades,* 342 U. S. 580, and *Carlson,* 342 U. S. 524, 535–6. The latter held Section 22 valid as applied to present Communists, and the former sustained the prior deportation statute* as applied in 1952 to aliens who were members of the Communist Party before 1940, even though there was no showing that the aliens themselves advocated or knew that the Party advocated violent overthrow of the Government. The two decisions, read together, cover petitioner's case which does not differ in its facts from instances before the Court in *Hari-*

* Section 23 (c) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, subjecting to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the Government by force and violence.

siades and its companion cases. His argument is mainly a reargument of points already considered in that decision.

The only difference, as applied here, between Section 22 of the 1950 Act and the 1940 Act upheld in *Harisiades* is the specification in the 1950 statute of membership in the Communist Party as a basis for deportation, thus removing the necessity of proving again and again in deportation cases the nature and objectives of the Party. Congress based this determination upon overwhelming evidence, received by its committees between 1931 and 1950, that the Communist Party has as its purpose the violent overthrow of the Government of the United States and serves as a fifth column for the Soviet Union, largely through the aid of alien Communists. These conclusions are buttressed by repeated judicial decisions since 1920 as to the nature and purposes of the Communist Party, by some 200 administrative determinations in deportation cases since that time, as well as by the record of persistent espionage, sabotage, and propaganda by Communists here and elsewhere on behalf of the Soviet Union. In view of the purposes of the Party as found by Congress, Section 22 is a reasonable exercise of the legislative power to provide for the deportation of any class of aliens whose presence in this country may endanger the security of the United States. The ending of the alien's theoretical right to a hearing on the nature of the Communist Party is not a significant difference from *Harisiades*.

The power of Congress to name the Communist Party specifically is also supported by the history of the country's expulsion legislation which contains some famous precedents for group designation without regard to individual worthiness. The Chinese deportation laws are the prime illustration. The Alien Enemy Act of 1798, on which Congress drew by way of analogy, is another, as is the anarchist deportation statute.

C. The reaffirmation in *Harisiades* that deportation is not a punishment for the purposes of the *ex post facto* clause of the Constitution disposes of petitioner's belated contention that Section 22 is a bill of attainder (as well as an *ex post facto* law), since a bill of attainder is a legislative act which inflicts *punishment* without trial. *United States* v. *Lovett,* 328 U. S. 303, 315.

D. The First Amendment is not violated by petitioner's deportation since he was a member of the Communist Party and *Harisiades* expressly holds (342 U. S. at 592) that deportation for past membership in that Party does not abridge First Amendment rights. Moreover, his membership came during the period (1945–1947) covered by *Dennis* v. *United States,* 341 U. S. 494.

E. Just as was the case with the 1940 statute enforced in *Harisiades,* the 1950 Act does not require knowledge by the alien of the Communist Party's advocacy of the forcible overthrow of the Government. The history, since 1918, of this class of deportation legislation plainly shows that personal advocacy or knowledge is not a prerequisite.

II

There was sufficient evidence to sustain the charge that petitioner had been a member of the Communist Party in San Diego, California, from at least 1945 to 1947. Petitioner's own admissions of membership and active participation are unequivocal, and these admissions indisputably relate to a period after the Party was reconstituted in 1945. In addition, there was testimony by a fellow member that petitioner was an active Party member in 1946 and 1947 and was elected to office in his local Party unit. Petitioner's current attacks on his own admissions and the Government witness' testimony fall far short of showing that there is no substantial evidence behind the administrative finding. *Cf. Tisi* v. *Tod,* 264 U. S. 131, 133; *Vajtauer* v. *Commissioner,* 273 U. S. 103.

ARGUMENT

I

CONGRESS HAS THE POWER TO PROVIDE, AS IN SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950, FOR THE DEPORTATION OF ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY

Petitioner contends that the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950, *supra,* pp. 2–4, which provides for the deportation of aliens who joined the Communist Party at any time after entering the

United States, is invalid. This question was briefed, though not decided, in *Heikkila* v. *Barber,* 345 U. S. 229, and *Martinez* v. *Neelly,* 344 U. S. 916 (see Govt. Br., No. 426, Oct. Term 1952, pp. 16–36, and Govt. Br., No. 218, Oct. Term 1952, pp. 63–70). In the perspective of the long history of judicial noninterference with legislative determinations regarding the expulsion of aliens, together with explicit Congressional findings as to the subversive aims and revolutionary methods of the Communist Party, as well as this Court's definitive opinions in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Carlson* v. *Landon,* 342 U. S. 524, we believe that this contention is without merit.

A. DECISIONS OF CONGRESS TO DEPORT CLASSES OF ALIENS ARE POLITICAL DETERMINATIONS WHICH THIS COURT HAS HELD ARE NOT REVIEWABLE BY THE JUDICIARY

As this Court declared, at its last Term, in *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." The reasons for this judicial abstention have been stated so recently and so fully in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, that it is unnecessary to set them forth again in any detail.[7] But

[7] See the Brief for the United States in the *Harisiades* case (and companion cases), Oct. Term, 1951, Nos. 43, 206, 264, which contains an extensive discussion of the history and the problem.

it is pertinent to recall—particularly since petitioner's brief wholly ignores them—the repeated holdings and declarations of this principle which the Court has made in the sixty year span from 1893 to 1953. These consistent reaffirmations have set the pattern for the decision of this and all cases testing the substantive validity of deportation statutes.

1. The doctrine initially derived from decisions of this Court which established legislative finality with respect to the exclusion of aliens. The principle, as it relates to exclusion, was firmly stated in the opinion in *The Chinese Exclusion Case,* 130 U. S. 581, 605, 606–607, where the Court observed that either in time of peace or in wartime, if the Government "through its legislative department" finds the presence of a class of foreigners to be inimical to our security, the legislature's determination is "conclusive upon the judiciary." Subsequently, in 1893, in the first expulsion case to come before this Court *Fong Yue Ting* v. *United States,* 149 U. S. 698, the Court, after quoting from *The Chinese Exclusion Case,* declared (149 U. S. at 707):

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

The Court then summarized the differing positions of the legislative and the judicial branches in this field:

> [1] The Court should "be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government" (149 U. S. at 712);
>
> [2] "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government * * *" (149 U. S. at 713); and
>
> [3] Accordingly, "The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject." (149 U. S. at 731.)

Aliens "remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest" (149 U. S. at 724).

Such unrestrained power to terminate the residence of aliens, the Court explained, was not inconsistent with prior decisions holding that

resident aliens enjoyed the protection of constitutional safeguards, including the due process clause. Referring to *Yick Wo* v. *Hopkins,* 118 U. S. 356, holding that aliens were protected by the due process and equal protection clauses of the Fourteenth Amendment, the Court declared: "The question there was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country" (149 U. S. at 725). Thus, while resident aliens are entitled to the privileges and immunities guaranteed by the Constitution in domestic matters, including procedural due process in deportation proceedings (see, e. g., *Japanese Immigrant Case,* 189 U. S. 86, 100; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33), the designation by Congress of classes of undesirable and deportable or excludable aliens pertains to international relations and is a political determination which "is conclusive upon the judiciary." *The Chinese Exclusion Case, supra,* 130 U. S. at 606.

No later decision of this Court has repudiated or modified this principle of full Congressional power to deport, and the Court has frequently reasserted it. *Lem Moon Sing* v. *United States,* 158 U. S. 538, 545, 547; *Wong Wing* v. *United States,* 163 U. S. 228, 231, 235, 237; *Li Sing* v. *United States,* 180 U. S. 486, 495; *Fok Yung Yo* v. *United States,* 185 U. S. 296, 302; *Japanese*

Immigrant Case, 189 U. S. 86, 97–100; *Turner* v. *Williams,* 194 U. S. 279, 289–291; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 467–8; *Tiaco* v. *Forbes,* 228 U. S. 549, 556–557; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Ng Fung Ho* v. *White,* 259 U. S. 276, 280; *Mahler* v. *Eby,* 264 U. S. 32, 39, 40; *United States ex rel Volpe* v. *Smith,* 289 U. S. 422, 425; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 318; *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Carlson* v. *Landon,* 342 U. S. 524, 534; *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210; cf. *United States* v. *Ju Toy,* 198 U. S. 253, 261; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Lapina* v. *Williams,* 232 U. S. 78, 88; *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 597–8.[8]

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[8] Cases which have sometimes been cited as modifying this principle have all involved determinations by the executive that a certain alien was a member of a deportable class previously established by the legislature, rather than a decision of Congress to deport a class of aliens whom it deemed undesirable residents. Only the latter is a political decision on a matter fundamentally affecting the public security. The administrative determination that a particular alien is a member of that class is a quasi-judicial determination, in the making of which the procedure employed must conform to procedural due process, since resident aliens are accorded the protection of the Constitution (*Yick Wo* v. *Hopkins, supra; Japanese Immigrant Case, supra; Wong Yang Sung* v. *McGrath, supra*). These cases do not hold, or state, that the due process clause restricts congressional decision with respect to the deportability of a class of undesirable aliens. Indeed, the very cases holding aliens entitled to procedural due process cite with approval the substantive constitutional doctrine of the *Fong Yue Ting* case. The most recent in-

Harisiades v. *Shaughnessy*, 342 U. S. 580, which we view as controlling here (see *infra*, pp. 29 *ff*), is but the latest application of the doctrine. The Court was asked to decide whether a provision calling for the expulsion of aliens who had at any time after entry into the United States belonged to an organization advocating the violent overthrow of the Government[9] violated the due process clause of the Fifth Amendment. As in past decisions in this area, the Court observed (342 U. S. at 588–589):

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

The Court concluded (342 U. S. at 591) that, "in the present state of the world,"

> it would be rash and irresponsible to reinterpret our fundamental law to deny or

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stance is *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 597–598, where this Court, citing the *Fong Yue Ting* case, declared, "Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."

[9] Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. 137.

> qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

It is true that the Court refrained from making an explicit reassertion of the proposition that under the Constitution the judiciary is wholly without power to override a legislative finding that a particular class of aliens is deportable, stating that the above-quoted "restraints upon the judiciary," while pertinent, did "not control today's decision * * *" (342 U. S. at 589–590). There was not, however, any repudiation of the legislative finality first established by the *Fong Yue Ting* case, *supra.* On the merits, the deportation provision in question was held to be a reasonable one in the light of the Congressional power and Congressional responsibility in the area of foreign affairs and national security. And on the same day as *Harisiades* the Court used, in *Carlson* v. *Landon,* 342 U. S. 524, 534, words which are directly linked to the historic principle of the *Fong Yue Ting* case:

> So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the *plenary power of Congress* to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders [emphasis added].

The *Harisiades* and *Carlson* cases, while perhaps withholding final judgment as to whether the judiciary is absolutely devoid of all power to review an expulsion measure, at least make it perfectly clear that such a measure must be allowed to stand unless it can be said that the menace perceived by Congress is a "fantasy or a pretense," that there are "no possible grounds on which Congress might believe" that continued American residence of the designated class of aliens was "inimical to our security" (342 U. S. at 590). Judicial review of a legislative determination that a certain class of aliens is undesirable or a threat to our security is thus very narrowly circumscribed, if indeed, in the present state of the world, it exists at all. Where Congressional power is "plenary", judicial authority to restrain, if there be any, is necessarily at its minimum.[9a]

2. In the sixty years since *Fong Yue Ting* was decided in 1893, the federal courts have consistently recognized and applied deportation provisions which have seemed to many—including some

[9a] See also the Brief for the Appellee in No. 195, this Term, *International Longshoremen's and Warehousemen's Union* v. *Boyd*, at pp. 58 *et seq.*

of the judges who have enforced them—to be harsh, discriminatory, or unfair. These laws have been upheld and enforced because the responsibility has been wholly Congress', and the courts have not swerved from a conscientious adherence to the view that the judicial branch has no concern with the "wisdom", "policy", "justice", or "severity" of these measures. *Fong Yue Ting* v. *United States,* 149 U. S. at 731; *Li Sing* v. *United States,* 180 U. S. 486, 495.

The *Fong Yue Ting* case itself upheld a statute which permitted the deportation of a Chinese laborer who had lawfully entered and had lived here for over a decade, solely because he could not prove his lawful residence by a white witness, as required by the statute and regulations, although he could and did prove that he was entitled to remain by Chinese witnesses. 149 U. S. at 703–4, 729–730, 732.[10] And where a Chinese person claimed American citizenship, the burden of proving non-alienage rested on him, although in all other cases the Government had the burden

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[10] Previously, the Court had held in *The Chinese Exclusion Case*, 130 U. S. 581, that Congress could exclude a Chinese alien who, after lawful residence in the United States for 12 years (1875–1887), had taken a temporary trip to China, and had returned to this country one week after the passage of the Chinese Exclusion Act of 1888, even though he had been issued a certificate when he left entitling him to reenter and the Exclusion Act had become law after he departed from China on his return voyage. This was an exclusion case, but the alien had had a twelve-year residence in the United States. Cf. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590.

of showing alienage. See *Bilokumsky* v. *Tod,* 263 U. S. 149, 153.

Turner v. *Williams,* 194 U. S. 279, indicated that Congress would be competent to exclude or deport aliens who were anarchists only in the sense that they philosophically opposed all organized government, but who did not believe in achieving that ideal through force. 194 U. S. at 294.[11] *Tiaco* v. *Forbes,* 228 U. S. 549, affirming 16 Phil. 534, sustained what was in effect a private deportation act by the Philippine legislature ratifying the Governor General's executive expulsion of 12 resident Chinese aliens who were considered by him to be undesirable and a menace to public order; no hearing was held. The Court expressly declared that Congress could have taken the same action.

Ludecke v. *Watkins,* 335 U. S. 160, upheld the executive's power under the Alien Enemy Act of 1798 to remove, after the close of hostilities, enemy aliens some of whom might be personally loyal to the United States. See *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 587, and *infra,* pp. 29–36, 56–60. Similarly, aliens have been held deportable for knowingly having in their possession, for the purpose of distribution, printed mat-

[11] Turner was arrested some 10 days after his entry and ordered deported on the ground that he came into the country in violation of the prohibition on entry of anarchists. 194 U. S. at 281.

ter advocating the forcible overthrow of the Government, although there was no proof that they personally held that conviction. *Tisi* v. *Tod,* 264 U. S. 131. With the admonition that "judicially, we must tolerate what personally we may regard as a legislative mistake" (342 U. S. at 590), *Harisiades* sustained the deportation of past Communists who may have fully cleansed themselves of all Party taint and who, even while members, did not personally advocate violence or know the Party's tenets. See *infra,* pp. 29 *ff.*

Because the statute required deportation of aliens twice convicted of crimes involving moral turpitude, the Second Circuit, through Judge Learned Hand, upheld a deportation order against a young American-reared alien twice found guilty of burglary, even though it thought that deportation would be "deplorable", with a "cruel and barbarous result" which would be a "national reproach". *United States ex rel Klonis* v. *Davis,* 13 F. 2d 630 (C. A. 2).[12] Though the case was

[12] The court said (13 F. 2d 630, 630–1):

"At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common con-

extreme and the judge unusually outspoken, these words epitomize the traditional judicial attitude, both in this Court and the lower federal courts, toward deportation legislation—the power and the responsibility belong to Congress and the courts cannot and should not intervene in judgment, no matter how appealing the alien's contention or severe the legislative decree.[13]

3. These settled principles prove the basic error in petitioner's repeated analogy to cases concerning public employment and public office (Pet. Br. 35–39, 42, 48–49).[14] Aliens are not in the same

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sent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach."

[13] For other pointed expressions of this attitude, see *The Chinese Exclusion Case*, 130 U. S. 581, 609; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 731; *Li Sing* v. *United States*, 180 U. S. 486, 495; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590, 596–598; *Shaughnessy* v. *Mezei*, 345 U. S. 206, 216; *Latva* v. *Nicolls*, 106 F. Supp. 658 (D. Mass.).

[14] Petitioner uses this analogy largely to support his argument that aliens cannot be deported for past membership which was without knowledge of the Communist Party's subversive aims. But it is noteworthy that none of the public employment cases on which he relies involved only past membership in the Party itself, as distinguished from "front" organizations. Membership in the Party itself may have a different status, even for public employees. Cf. Section 241 (a) (6) (E) of the Immigration and Nationality Act of 1952, 66 Stat. 205, which differentiates Communist-front organiza-

category as citizens who are public servants or seek to become such. The latter, because they are citizens and full members of the American body politic, have certain substantive rights against discriminatory treatment—*e. g.*, because of race, or color, or belief—which the courts will protect even as against legislatures. See *Wieman* v. *Updegraff*, 344 U. S. 183, 191–2; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100. But the alien, as every opinion since the *Chinese Exclusion* case shows (*supra*, p. 14 *ff*), has a different and much more precarious status when the question is one of his exclusion or expulsion. He is not a full member of the political community, and the legislature's power to separate or exclude him is not limited, as with citizens, but "plenary" (342 U. S. at 534) and "largely immune from judicial control" (345 U. S. at 210). "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Gov-

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tions from the Communist Party, for deportation purposes, by excusing from deportation aliens who can show that they did not know or have reason to know that the "front" organization was a "front".

Mascitti, whose case was decided along with *Harisiades*, 342 U. S. 580, presented the same analogy in his brief to this Court in 1951 (see Brief for the Appellant, Oct. Term, 1951, No. 206, pp. 30–2).

ernment's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose" (*Harisiades* v. *Shaughnessy,* 342 U. S. 580, 586–7, footnotes omitted).

A simple historical comparison of the statutory classes of excludable and deportable aliens [15] with the legislative categories of persons who must be excluded or separated from the public service demonstrates that alien legislation has been founded on racial and other considerations normally inadmissible in the regulation of government employment. The Chinese exclusion and deportation laws are, of course, the prime example (see, *supra,* pp. 14–16, 21–22; *infra,* pp. 55–56); the national origin and quota systems are others. See also *Turner* v. *Williams,* 194 U. S. 279, 294 (alien anarchists). The best that can be said for petitioner's analogy is that, if a substantive deportation provision is (like public employment legislation) to be measured by some theory of reasonableness or arbitrariness, the standard of acceptability is much lower [16] and many consider-

[15] For an older listing of deportation provisions, see Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 60–69; and Van Vleck, *The Administrative Control of Aliens* (1932), pp. 3–22, 83 *et seq.* The current general deportation provisions are contained in Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204. The exclusion process is discussed in *Van Vleck, op. cit. supra,* at 3–22, 33 *ff.*

[16] See *Harisiades,* 342 U. S. at 590 ("a fantasy or a pretense"; "no possible grounds"), affirming 187 F. 2d 137 (C. A. 2) at 141 (giving as an example of an assumedly invalid statute, "that all blue-eyed aliens be deported").

ations forbidden in the area of public employment may properly be taken into account.

This fundamental differentiation stems, as the Court has pointed out (342 U. S. at 585 *ff*), from the root fact that the alien, so long as he does not become naturalized, is not fused into the American community. He bears neither the full obligations of the citizen nor the citizen's undivided allegiance to this country; and Congress can rightly consider that his failure to become naturalized generally bespeaks an indifference to, or rejection of, full participation in American life. In this clashing world of sovereign states, moreover, the country cannot unilaterally deprive itself of a recognized and traditional "power of defense and reprisal"—often harsh and "bristl[ing] with severities"—against the unfriendly or unfavorable actions of foreign states. 342 U. S. at 587–589, 591. The alien's tenuous status is the price he must pay for not unequivocally throwing in his lot with this nation in a world which is not yet one.

B. THE DETERMINATION BY CONGRESS IN SECTION 22 TO MAKE DEPORTABLE ALIENS WHO AT ANY TIME AFTER ENTRY HAVE BEEN MEMBERS OF THE COMMUNIST PARTY IS AMPLY SUPPORTED BY THE LEGISLATIVE FINDINGS AND BY ADMINISTRATIVE AND JUDICIAL DECISIONS

If Congressional power to deport is plenary and unlimited, as many of the decisions of this

Court suggest (*supra,* p. 13 *ff,*)[17] there is no need to go further in order to uphold the validity of Section 22 of the Internal Security Act of 1950. Congress has made its meaning plain; it has ordered the deportation of aliens who, at any

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[17] Congress appears to have viewed its power as absolute. See S. Rep. No. 2230, 81st Cong., 2d Sess., p. 26 (reporting on the very provision here in issue):

> It is well established by numerous decisions of the Supreme Court that every sovereign nation has the power, inherent in its sovereignty, to forbid the entrance of aliens or to admit them upon such conditions as it may prescribe (*United States ex rel. Knauff* v. *Shaughnessy*, Supreme Court, Jan. 16, 1950; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 1892). A corollary to that essential power for its self-preservation is the inherent power of a sovereign to deport aliens. (See *Tiaco* v. *Forbes*, 228 U. S. 549, 1913.) The authority of Congress over the admission of aliens is plenary, and it may exclude them altogether or prescribe the terms and conditions upon which they may enter and remain in the country. (See *Lapina* v. *Williams*, 232 U. S. 78, 1914; *Wong Wing* v. *United States*, 163 U. S. 228, 1896.)

See also the following statement by Senator Ashurst during the debate on the 1940 Act (86 Cong. Rec. 8345):

> The United States has plenary power to invite any alien here it chooses to invite, and to exclude an alien at any time for a good reason, for a bad reason, or for no reason at all. The United States has full power, acting within its sovereignty, and it is not a breach of any alien's constitutional rights, to bar him at any time for any reason, or for no reason. In other words, a citizen need not give a reason why he invites a guest, and upon a guest there is certainly imposed the duty of behaving himself as well as the family behaves itself, and if an alien misbehaves, the sovereign plenary power of the Government is complete and full to exclude him at any time.

time after entry, became members of the Communist Party, even though they are no longer members when deportation proceedings are begun.[18] But even if some measure of judicial review remains, the statute must be sustained.

1. *The Harisiades and Carlson rulings in 1952.*—Not only does the *Harisiades* decision affirm that the judiciary assumes, at most, a subordinate role in reviewing Congressional determinations regarding the expulsion of undesirable aliens, but in holding that, on the merits, the provision there in question did not infringe the due process clause of the Fifth Amendment, the decision goes practically the whole road (together with *Carlson* v. *Landon,* 342 U. S. 524) toward validation of Section 22 of the 1950 Act.

(a). In *Harisiades,* the Court upheld the constitutionality of Section 23 of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, which made subject to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence.[19] The organization involved was the Communist

[18] We deal below, pp. 67–69, with the argument that the statute should be interpreted to require the deportation of past members only if they knew of the Communist Party's advocacy of force and violence (Pet. Br. 42).

[19] The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law, and an infringement of the First and Fifth Amendments.

Party of the United States, the aliens had discontinued their membership, and the cases were decided on the assumption that they had not personally shared or known the purpose of the organization (see 342 U. S. at 582–3).[20] That much is

[20] The records in the three cases reported under *Harisiades* v. *Shaughnessy* are perfectly clear that there were no final administrative or judicial findings on the matters of personal belief in force or knowledge that the Party advocated force. As to Harisiades, the Board of Immigration Appeals expressly found "that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence" (Oct. Term 1951, No. 43, R. 873). Harisiades testified that force was to be used by the Party only defensively, and that he did not himself believe in the use of force and violence (No. 43, R. 38–48).

Coleman testified at her deportation hearing that she never heard anyone advocating the overthrow of the government by force or violence and she herself did not believe in it (Oct. Term 1951, No. 264, Tr. 82). There was no finding of personal advocacy of force or of knowledge that the Party advocated force.

Mascitti testified at his hearing that he heard some speakers advocating the use of violence, that he did not personally believe in the forcible overthrow of the government, that he was not entirely clear as to what the policy of the Party was in that respect, and that he resigned when he discovered, or thought through, the aims and precepts of the Party (Oct. Term 1951, No. 206, Tr. 46–50, 78, 82–3). He also testified that he knew that the Party advocated the establishment of proletarian dictatorship by force or violence in the event that the capitalist class resisted, but that he did not believe that this would happen in the foreseeable future (No. 206, Tr. 17, 46, 48, 49). It was argued to the Board of Immigration Appeals that Mascitti did not know of the unlawful objectives of the Party, but the Board held that it was unnecessary to prove knowledge and also that

also true here: petitioner has been ordered deported because of his discontinued Communist Party membership, in the absence of a showing of subjective advocacy of the Party's ends. The sole distinction is that in *Harisiades* there were administrative findings that at the time the aliens belonged to the Communist Party it taught and advocated the overthrow of the government of the United States by force and violence, while under Section 22 of the 1950 Act, because it makes past or present membership in the Communist Party *per se* grounds for deportation, no such finding is necessary. As a result, there has been no occasion for petitioner to show that at the time of his membership the Party did not advocate the violent

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membership, attendance at meetings, and reading Party literature is automatically equivalent to knowledge (No. 206, R. 17).

The Government presented these cases on the assumption that the aliens did not personally advocate force and did not know of the Party's advocacy of force. In its brief (Brief for the United States, Oct. Term 1951, Nos. 43, 206, 264) at p. 91, the Government stated:

> "some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service had not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings."

See also pp. 31–49, 87–89, of the Government's brief to the same effect.

overthrow of the government; and it is the lack of opportunity to make such a showing which it must be contended (unless *Harisiades* is to be overruled) violates the due process clause.

Petitioner's position is seriously undetermined, at its very foundation, by the explicit declaration in *Carlson* v. *Landon,* 342 U. S. 524, decided the same day as *Harisiades,* that "We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens" (342 U. S. at 535–536). This was said with direct reference to Section 22 of the Internal Security Act,[21] and the only difference was that the aliens

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[21] The Court said immediately before the sentence we have quoted in the text (342 U. S. at 534–535):

> Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation. The passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. The reasons for the exercise of power are summarized in Title I of the Internal Security Act.

in the *Carlson* case were charged with present membership in the Communist Party. So the Court has already upheld Section 22 as it applies to present membership, and such aliens need not be given the chance to prove that the Communist Party does not advocate overthrow of the Government by violence. Does petitioner have a greater right to make such a showing because he is charged with past membership?

There would seem little reason to accord less standing to a solemn Congressional declaration as to the past status of the Communist Party than to a finding directed to the present. But, in any event, *Harisiades* seems to us to dispose of the contention that the alien charged with past membership must, unlike the present member, be accorded a hearing on the nature of the Communist Party. The Court held that Congress in "exercising the wide discretion that it alone has in these matters * * *" could eliminate the administrative burden of proving in each case that an alien who had discontinued his Communist Party membership had not "sincerely renounced Communist principles of force and violence * * *" (342 U. S. at 595–596). Under that statute aliens were given no opportunity to present testimony that at the time of the deportation proceeding they were, as individuals, no longer a threat to our national security. Because Congress has such wide discretion in this area, and because there

was reason for Congress to believe that in many cases, if not in most, aliens who ostensibly discontinued their Party membership did not do so in fact, this provision was held not to violate the due process or *ex post facto* clause (see 342 U. S. at 593–596). Significantly, the Court treated the 1940 deportation provision, there involved, as directed mainly at Communists, and paid much attention to the nature and activities of the Communist Party, particularly as Congress had a right to view it. See 342 U. S. at 590–1, 593–4, 595–6.

The statutory change embodied in Section 22 of the 1950 Act also sought to lift from the government a difficult and unnecessary administrative burden, namely, that of introducing again and again in deportation proceedings evidence as to the nature and activities of the Communist Party.[22] This action by Congress is fully sustained by the Court's holding in *Harisiades* that it was proper for Congress to eliminate the burden of distinguishing between sincere and fraudulent disaffiliations from the Communist Party. Even assuming that in the past 30 years there may have been intervals during which the Party did not advocate doctrines inimical to our security

[22] See *infra*, pp. 49, 50–53, 82–87, for a recital of (a) the legislative findings in the 1950 Act on the nature of the Communist Party, (b) the court decisions on that issue, and (c) the number of deportation cases involving the issue since 1920.

(but see *infra,* p. 40 *ff*), the administrative task of ascertaining whether a particular alien's membership coincided precisely with such an interval is similar to, and at least as onerous as, that eliminated by the 1940 provision upheld in *Harisiades.* In fact, the very problem which Congress sought to obviate by the earlier provision would be repeatedly raised if petitioner (and others) were to be allowed to claim as a defense that the Party during their terms of membership had only innocent purposes. It would then become necessary in each case to determine whether the alien's apparent disaffiliation at the time the Party resumed its advocacy of violent overthrow of the government was sincere and genuine and not merely a subterfuge. Moreover, not only would the individual alien's motives in leaving the Party have to be examined, but it would also be necessary to ascertain whether the Communist Party had during the period in question actually relinquished its usual aims and methods.[23] On the basis of this Court's holding in *Harisiades,* Congress has the power to decide that this need not be the government's burden, but that the operating postulate is to be that the Party has always advocated the use of force. And to deprive the alien of the right to show otherwise—not a significant right, in actual fact (see *infra,* pp. 41 *ff*, 50–

[23] Congress was concerned with this problem. See *infra,* p. 48.

54)—is surely no more inadmissible than to make irrelevant a showing of reformation and change, a showing which some aliens could make with far greater ease and possibility of success than they could demonstrate that the Communist Party did not advocate force.

In short, the *Carlson* and *Harisiades* cases, read together, make clear that alien Communists are deportable, and that Congress can reasonably provide that discontinuance of membership in the Communist Party need not be taken into account.[24]

(b). For the most part, petitioner's constitutional argument (Pet. Br. 23, *ff*) consists of (i) an attempt to distinguish the *Harisiades, Coleman* and *Mascitti* holdings and opinion by putting forward factual differences which do not exist, and (ii) a covert attack on that ruling.

(i). Galvan's case is said to be "entirely different from that of the aliens in *Harisiades,* who had been active participants in the inner core of the Communist Party" (Pet. Br. 28–9). But regardless of whether Harisiades can properly be

[24] In addition to the court below, the Seventh Circuit upheld the 1950 Act, in effect, in *Martinez* v. *Neelly*, 197 F. 2d 462 (C. A. 7), affirmed by an equally divided court, 344 U. S. 916. The Second Circuit's opinion in *Harisiades* (Swan, L. Hand, and A. N. Hand, JJ.) indicates that it felt that Harisiades would be deportable under Section 22 even if there were insufficient evidence in that record (under the 1940 statute) that the Communist Party advocated forcible overthrow. 187 F. 2d 137, 141. See also *Latva* v. *Nicolls*, 106 F. Supp. 658 (D. Mass.).

called a member of the Party's "inner core" (see 342 U. S. at 581–2), certainly Mascitti and Mrs. Coleman, whose cases are governed by the same opinion, were no more "active participants in the inner core" than was petitioner. See 342 U. S. at 582–3. They were purely rank-and-file members, while petitioner held the Party office of educational director of his local unit; their participation in Party activities was at least as small as petitioner avers his were, and the Government did not claim otherwise (see Brief for the United States, Oct. Term, 1951, Nos. 43, 206, 264, pp. 48–9). The *Harisiades* decision plainly cannot be differentiated on this ground.

Great stress is also laid (Pet. Br. 7, 24–5) on the fact that Galvan resigned in 1947, while Harisiades and Mrs. Coleman left in 1939, when the Party dropped aliens, and presumably they resigned for that reason. But Mascitti left the Party in 1929 "apparently because he lost sympathy with or interest in the party" (342 U. S. at 582), and his case is therefore on precisely the same plane as the most favorable view of petitioner's case. Moreover, it is not hard to imagine reasons for leaving the Party in 1947 which would not reveal any actual change of heart. National antagonism to the Party and its objectives was fully apparent, and by then certain steps were being taken against

Party members.[25] Petitioner, an alien subject to deportation, may have been afraid of that consequence of membership.[26]

Most important of all is the total disregard in petitioner's brief of the indisputable but essential fact that the *Harisiades, Coleman,* and *Mascitti* judgments and opinion do not turn on the aliens' personal advocacy of force or their knowledge of the Party's advocacy of that method of change. The records in those cases definitely negatived that assumption (see *supra,* pp. 30–31, n. 20), the Government did not argue on that basis, and the Court did not render its decision on it. There is, therefore, no distinction between this case and *Harisiades* on the score of personal belief or knowledge of the Party's aims.

(ii). What remains of petitioner's argument is largely a reargument, without saying so, of the

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[25] For instance, the Executive Order establishing the loyalty program for federal employees was issued on March 21, 1947. See *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 125. The first *Bridges* deportation proceedings had begun in 1938, and the second was carried on in the 1940's; *Bridges* v. *Wixon*, 326 U. S. 135, was decided in June 1945.

[26] Certain of petitioner's statements, during the inquiry in March 1948, are relevant to the question of why he left the Party. He obviously was fearful of deportation (T. 182). He was "confused" about whether the Communists were serving the best interests of the American people (T. 180). In answer to a query as to his opinion of the Russian form of government, he said: "I don't know much about that system. You don't hear much about it. They keep it pretty quiet" and "I don't know much about the system there, I could not say much about it" (T. 181).

ruling in *Harisiades*. The Court was fully as aware as here of the contentions that rank-and-file members did not know of the Party's real aims, that the Party moved members by appeals to "democracy" and even to patriotism, and that it might be harsh and unfair to deport resident aliens simply because they had once belonged to a subversive organization which had deceived them as to its ultimate objective. It can be fairly said that, though perhaps in less extensive or colorful form, the substance of almost every one of petitioner's arguments was before the Court in the *Harisiades* series. And the Government did not meet these arguments by simply attempting to deny their factual truth (though there is certainly much question as to some of the premises).[27] The validity of the statute was supported on the plenary power of Congress over deportation of aliens, taken together with the facts of history and common knowledge showing that Congress's concern was not a mere "fantasy" or "pretense."

The Court took its stand (as we have already recalled, *supra*, pp. 18–19, 23, 29–31, 33–34) on the breadth of the legislative power. It upheld what was regarded in historical context as "an extreme application of the expulsion power" (342 U. S. at 588). The Court thought that "in the present

[27] Particularly in the cases of Mascitti and Mrs. Coleman, the Government did not urge that the aliens were anything other than rank-and-file members, as Galvan claims to be.

state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation". The "world-wide amelioration of the lot of aliens * * * is peculiarly a subject for international diplomacy" and "reform in this field must be entrusted" to the political branches. 342 U. S. at 591. If there is to be a policy of forgiveness and recognition of reformation, it is for Congress to provide (342 U. S. at 595).

We do not feel it necessary to reargue the issues in the *Harisiades, Coleman,* and *Mascitti* cases which were fully heard by the Court only two years ago. The Government's brief in those cases contains a lengthy and detailed discussion of those questions, and the Court's considered opinion has given the authoritative answer.

2. *The history of Section 22.*—This case does differ from *Harisiades* in that the 1950 Act expressly names the Communist Party. We believe, as we have argued (*supra,* pp. 29–36), that the reasoning and holdings of the *Harisiades* and *Carlson* cases support Section 22 even on the assumption that there have been isolated periods when the Communist Party did not teach and advocate the violent overthrow of the Government. But it is not necessary to make that assumption. The history of Section 22 discloses an extensive background of exhaustive study culminating in a finding by Congress that the Communist Party of the United States has at all

times been a threat to the national security. We turn now to consider this legislative history, as well as the judicial and administrative decisions which have consistently upheld the conclusion reached by Congress with regard to the menacing character of the Communist Party.

In 1931 a special committee of the House investigated and reported on Communist propaganda in the United States (H. Rep. 2290, 71st Cong., 3d Sess.). That committee cited the language of the program of the Communist Party as established by the Comintern at the Sixth World Congress, September 1, 1929, at Moscow to the effect that (H. Rep. 2290, *supra,* p. 15):

> The communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized by the violent overthrow of the entire traditional social order.

The report concluded that (H. Rep. 2290, *supra,* pp. 65–66):

> It is self-evident that the communists and their sympathizers have only one real object in view, not to obtain control of the Government of the United States through peaceful and legal political methods as a political party, but to establish by force and violence in the United States and in all other nations a "soviet socialist republic" to which they often refer in their literature as a "dictatorship of the prole-

tariat." These facts have been repeatedly substantiated at the hearings of the committee.

In 1935, the McCormack committee of the House, which was charged with the investigation of Nazi and other propaganda, found "both from documentary evidence submitted to the committee and from the frank admission of Communist leaders * * *" that the objectives of the Party included the overthrow by force and violence of the Government of the United States. H. Rep. 153, 74th Cong., 1st Sess. (1935) p. 12. It concluded that the Party "is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the Communist International with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of the government by violence and force." H. Rep. 153, *supra,* p. 21.

In 1939, extensive hearings before the House Committee on Un-American Activities informed Congress that in 1929 the Soviet Union, acting through the Communist International, ejected Lovestone and Gitlow from the leadership of the Communist Party of the United States and replaced them with Foster and Browder.[28] Current evidence of foreign control of the Party was fur-

[28] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939) vol. 7, pp. 4432, 4671.

nished to Congress when, with the signing of the Hitler-Stalin Pact in August 1939, resistance to Nazi aggression suddenly became an "imperialistic war" in the view of American Communists. Also, between 1938 and April 1940, Congress had observed how the ideological allies of Hitler in Austria, Czechoslovakia and Norway had aided in subjecting those countries to Nazi rule.

Thus, by 1940, Congress was not merely concerned with the old-fashioned concept of domestic insurrection, but with the more subtle and dangerous situation in which a local totalitarian political group, whether Communist or Nazi, is the actual or potential fifth column ally of the totalitarian government by which it is controlled. Section 23 (a) of the Alien Registration Act of 1940, in making deportable aliens who had at any time been members of a group advocating the violent overthrow of the Government, was part of a larger statute, part of which, known as the Smith Act, was upheld by this Court in *Dennis* v. *United States,* 341 U. S. 494, and part of which required the registration of aliens. The same Congress also enacted the Voorhis Act of October 17, 1940,[29] requiring the registration of "Every organization subject to foreign control which engages in political activity," and understood that the Communist Party of the United States would

[29] 54 Stat. 1201, 18 U. S. C. 2386.

be required to register.[30] The *Harisiades* opinion expressly recognizes that the 1940 Congress directed the deportation provision there in question against alien Communists because of "alarm about a coalition of Communist power without and Communist conspiracy within the United States" (see 342 U. S. at 590–1).

Between 1940 and 1950, Congress observed that Communist parties everywhere are simply the fifth column of Soviet aggression. Where they have obtained power, as in Czechoslovakia, they have done so by violence, destroyed their political opponents, and degraded their native lands into satellites of the Soviet Union. Where they have not obtained power, they carry on, in the United States and elsewhere, espionage, sabotage, and propaganda on behalf of the Soviet Union. American troops fought with the United Nations in Korea to check Communist aggression, while this country has entered into costly and unparalleled military alliances to discourage Communist aggression elsewhere.

Section 22 of the Internal Security Act originated in S. 1832, 81st Cong., 2d sess., which was

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[30] H. Rep. 2582, 76th Cong., 3d sess. Immediately, the Communist Party of the United States ostensibly withdrew from the Communist International to avoid registration under the Voorhis Act. See resolution adopted at the 1940 Convention of the Communist Party, reproduced in the record in *Dennis* v. *United States*, 341 U. S. 494, vol. XIV, pp. 11180–11181.

passed by the Senate on August 9, 1950, and was later incorporated by the Senate into the internal security bill (S. 4037, 81st Cong., 2d sess.). S. 1832 was introduced by Senator McCarran in May 1949,[31] and was the subject of extensive hearings, between May and September 1949, before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, under the heading of *Communist Activities Among Aliens and National Groups.*

After these hearings, S. 1832 was revised to provide, *inter alia,* for the deportation of aliens who have at any time been members of the Communist Party of the United States. It was passed by the Senate without debate (96 Cong. Rec. 12058, 12060). However, the accompanying report of the Senate Committee on the Judiciary (S. Rep. 2230, 81st Cong., 2d Sess.), after summarizing and quoting from the testimony of former high officials of the Communist Party during the 1949 hearings, set forth the conclusions upon which the provision is based, as follows (pp. 10, 11, 12, 16):

> Since the rise of Soviet Russia during the past three decades, the problem of subversives has become a vital consideration in

[31] As originally introduced, S. 1832 would have provided stricter controls over visas and other travel documents, and strengthened the laws governing the exclusion and deportation of subversive aliens, without specifically referring to the Communist Party of the United States.

any evaluation of national immigration and naturalization policies. The impact of world events upon our immigration system can no longer be ignored. As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion.

* * * * *

The Communist International has in its employ a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.

* * * * *

The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it

can only rely on its own chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized.

* * * * *

It is a well-established fact that both the leadership and membership of the Communist Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.

The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have been documented by the testimony presented before the subcommittee.

* * * * *

From the statements made before the subcommittee, as well as the general evidence gathered—the history of the Communist movement, the changes of its policies, the manner of its expression, the utterances of the Comintern leadership—the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet

> Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

After reviewing existing law, the Committee noted (pp. 24–25) that:

> * * * While Congress has clearly proscribed classes of aliens which are to be excluded from admission or deported after admission, there is the obvious difficulty of establishing that certain aliens or organizations do advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. The evidence developed by the subcommittee should remove any doubt about the Communist Party's advocating the overthrow of our Government by force or violence in order to consummate its plans of a world-wide Communist totalitarian dictatorship. Yet, membership in the Communist Party, without positive proof that it so advocates the overthrow of government by force and violence, is insufficient grounds for deporting such an alien member.

The substance of the Committee's conclusions is embodied in the extraordinary findings which Congress made in Section 2 of the Internal Security Act as to the purposes and methods of communism, "as a result of evidence adduced before various committees of the Senate and House of Representatives" (64 Stat. 987–989). The first of these findings states:

> There exists a world Communist movement which, *in its origins, its development, and its present practice,* is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, * * * and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization. [Emphasis supplied.] [32]

The bitter debate over the internal security bill did not relate to Section 22. Indeed, the dissenting minority of the Senate Committee on the Judiciary stated that "We do not quarrel with the provision * * * for the exclusion of alien members of the Communist Party of the United States, or with the later provision [Section 22 of the Internal Security Act] for their deportation. It is undisputed that the Communists of the world, including the United States, are the

[32] The findings in Section 2 are reprinted in the Appendix, *infra*, pp. 82–87.

fifth column allies of the Soviet Union." S. Rep. 2369, Part 2, 81st Cong., 2d sess., p. 14.[33]

In the context of the legislative findings, Section 22 is thus a substantially unanimous Congressional determination, based on years of legislative investigation, that the Communist Party of the United States has at all times been a foreign-controlled organization devoted to the ultimate overthrow of the government by violence and, more immediately, acting as a fifth column in aid of Soviet aggression.[34]

3. *Judicial and administrative adjudications as to the Communist Party.*—As the Court has observed, "* * * a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." *Block* v. *Hirsh,* 256 U. S. 135, 154. When such a declaration by Congress is supported not only by its own investigations but by repeated judicial and administrative determinations that the Communist Party has advocated the violent overthrow of the Government, it should not be disturbed in the absence of the most

[33] Section 22 was not contained in the internal security bill as it passed the House (see H. Rept. No. 3112, 81st Cong., 2d Sess., p. 48; 96 Cong. Rec. 15287). It was added by the Senate and included in the conference substitute. The debate in the House on the conference bill, and in overriding the Presidential veto, did not touch directly on Section 22.

[34] Section 22 has now been embodied in the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong.) as Section 241 (a) of that Act.

extraordinary circumstances. See *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1) (covering the period 1919–1920); *Antolish* v. *Paul*, 283 Fed. 957 (C. A. 7) (early 1920's); *Ungar* v. *Seaman*, 4 F. 2d 80, 81 (C. A. 8) (1912–1920); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.) (early 1920's); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9) (1926–1929); *Murdoch* v. *Clark*, 53 F. 2d 155 (C. A. 1) (the 1920's); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2) (the late 1920's); *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7) (the late 1920's); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1) (1930–1935); *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2) (1925–1939); *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2) (1945–1948).

In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940 (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, see *supra*), in sustaining the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n* v. *Douds*, 339 U. S. 382), and in enforcing the deportation and bail provisions ofthe Internal Security Act of 1950 (*Carlson* v. *Landon*, 342 U. S. 524), this Court has recently recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st

Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth column activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that the Communist Party has advocated overthrow of the Government by force and violence. See also *Adler* v. *Board of Education*, 342 U. S. 485.[35]

Years of administrative adjudications likewise stand behind the legislative findings embodied in the Internal Security Act in 1950. The Immigration and Naturalization Service estimates that from 1918 to September 1950 (when the Internal Security Act was passed) approximately 200 aliens were adjudged to be members of the Communist Party (or its predecessors or affiliates) and in each case the Party was administratively

[35] In *Schneiderman* v. *United States*, 320 U. S. 118, an attempt by the Government to denaturalize for fraud, the Court held that the evidence in the record as to the Communist Party's advocacy in 1927 of force and violence was not indisputable enough to meet the requirement that proof of fraud in naturalization be "clear, unequivocal, and convincing". But the Court specifically refused to pass for itself on the issue of the Party's advocacy of force (320 U. S. at 158), and declared that it was not deciding "what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's [Schneiderman's] testimony is acceptable at face value." The case turned wholly on the special requirements of proof in denaturalization proceedings, and does not constitute an adjudication as to the true nature of the Communist Party.

determined, under the deportation statute as it then read, to advocate the forcible overthrow of the Government.[36]

These judicial and administrative findings are significant, not only because they give great weight and sanction to the legislative determination, but also because they indicate the smallness of the possibility that petitioner, or any other alien, could show that the Communist Party did not advocate force and violence.[37] That theoretical choice is practically non-existent, and Congress has really done no more than eliminate the burden of introducing again and again in deportation proceedings evidence, documentary and oral, as to the Party's nature and activities.[38]

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[36] Almost half of these adjudications were in the period 1918–1920, and the other half in the period from 1921 to September 1950. There were about 75 such adjudications in the decade from 1930 to 1940.

[37] Petitioner admitted membership in the Communist Party from 1944 to January 1947. *Supra*, pp. 4–5, *infra*, pp. 71–72. The conspiracy charged in the *Dennis* case began in April 1945 and continued to July 1948, 341 U. S. at 495, 498, 547–8, 561.

[38] See *Milasinovich* v. *The Serbian Progressive Club*, 369 Pa. 26, and *Albert Appeal*, 372 Pa. 13, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that (372 Pa. at 20–21):

> It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement * * *.

By Section 22 Congress has substituted for a process of routine proof in individual cases a uniform rule based on its own investigations, prior judicial and administrative proceedings, and facts of current and past history known to all.[39]

4. *Congressional power, under the due-process clause, to deport specifically named classes of aliens.*—As we have just shown (*supra,* pp. 40–54), legislative investigations and findings, judicial and administrative decisions, and common knowledge, all combine to reinforce Congress' determination in the 1950 Act that the Communist Party advocates, and has always advocated, forcible overthrow of the Government and that alien Communists should be deported. As in *Harisiades*—which itself refers explicitly to the connections of the Communist Party with force and with the Soviet Union (342 U. S. at 590–1) (see *supra,* pp. 23, 29 *ff*)—Congress' view cannot be called a "fantasy or a pretense"; it cannot be said

[39] It is important to note that under the pre-1950 system (upheld in *Harisiades*) a finding by the immigration officials that the Communist Party advocated force, based on the usual documentary evidence and the testimony of one or more persons who were key members of the Party during the period of the alien's membership, would be upheld on *habeas corpus*, even though there was other evidence to the contrary. See *Tisi* v. *Tod*, 264 U. S. 131, *Bilokumsky* v. *Tod*, 263 U. S. 149, *Vajtauer* v. *Commissioner*, 273 U. S. 103. all affirming and applying the rule that the immigration officials' findings of fact must be upheld if supported by some evidence, even though the finding might be held erroneous on a *de novo* judicial appraisal.

that "there were then or are now no possible grounds on which Congress might beleve that Communists in our midst are inimical to our security" (342 U. S. at 590). That being so, the basic rationale of *Harisiades* (and its predecessor decisions) compels the upholding of Congress' deliberate choice to deport past and present Communists.

The practice of Congress, in the 1950 Act, of specifically naming the Communist Party, instead of continuing to use the more general classification of the 1940 Act which does not refer in terms to the Party, has support, as we have pointed out, in the history of the Party. It was upheld as to deportation of present Party members in *Carlson* v. *Landon,* 342 U. S. 524, 534–536 (*supra,* pp. 32–33). The naming of the Communist Party in the oath provision of the Taft-Hartley Act was sustained in *American Communications Ass'n* v. *Douds,* 339 U. S. 382, and *Osman* v. *Douds,* 339 U. S. 846, 847.

The practice of designating a class by name also has the support of judicially-validated deportation precedents relating to other groups. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 717, tells us that the root of the Chinese exclusion and deportation laws was the belief that "the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by them-

selves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests * * *. See also *Wong Wing* v. *United States,* 163 U. S. 228, 237 ("aliens whose race or habits render them undesirable as citizens"). But Congress did not take the various components of these charges against the Chinese and fashion a general category of deportable aliens which would not mention the Chinese by name but was intended to cover them by its general description. Congress, as in this case, chose to specify instead of to generalize; it listed by name the class the bulk of whose members it found to be undesirable residents, even though it may be assumed that there were individual Chinese who could plainly not be characterized as "strangers in the land". For many years, "anarchists" have been excluded by name and held deportable, and the Court has upheld the statute even as applied to one professing to be a philosophical anarchist "innocent of evil intent". *Turner* v. *Williams,* 194 U. S. 279, 294.[40]

[40] In this connection, it is appropriate to recall the other general classes of aliens Congress has classified as deportable. See footnote 15, *supra*, p. 26. A survey of these categories will show instances in which persons who fall into a deportable class may well be individually and personally worthy. *E. g.*, Sections 241 (a) (3) and (8) of the 1952 Act, dealing with aliens who become public charges or are institutionalized at public expense for mental disease.

Also, in enacting Section 22, Congress was proceeding by conscious analogy [41] to the Alien Enemy Act of 1798 which authorizes the deportation of aliens who are nationals of a country at war with the United States or by which invasion of American territory is "threatened." As this Court noted in *Harisiades* v. *Shaughnessy*, 342 U. S. at 587:

> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personnally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use.

By the Alien Enemy Act, Congress conferred upon the President power to deport aliens who are nationals of a hostile country without regard to whether a particular alien had ever evidenced the slightest hostility to the interests of the United

[41] See S. Rep. 2230, 81st Cong., 2d Sess., pp. 16–17; *The Immigration and Naturalization Systems of the United States*, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788–789.

States.[42] Presidential action under the Act is reviewable only upon the issue of whether the particular alien falls into the category of enemy aliens. *Ludecke* v. *Watkins*, 335 U. S. 160.

The Alien Enemy Act dealt with problems of internal security created by actual or threatened hostilities between national states and with the techniques of warfare which existed in the early 19th century. In 1950, Congress was dealing with the threat to the peace and security then and now confronting the United States. It has found that Communists everywhere have as their objectives the violent overthrow of non-Communist governments and serving the interests of the Soviet Union. It has found that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. *Supra*, pp. 45–48. It has concluded, in effect, that the possibilities of political violence and treachery, particularly in a time of crises, on the part of alien members of the Communist Party are too great for the United States to assume the risks of attempting to distinguish between those members of the Party who have knowledge of and share its purposes, and those who do not, or of

[42] That the Fifth Congress which enacted the Alien Enemy Act did not regard the use of its powers over aliens to protect the security of the nation as limited to periods of actual war, is emphasized by the fact that the House twice rejected proposals to delete the words "or threatened". Annals of Congress, 5th Cong., 2d Sess., pp. 1786, 1792.

determining the sincerity of those who assert they have left the Party and rejected its principles.

If a statute passed during time of war specifically named the enemy countries whose citizens were to be detained or deported, it would be just as valid as if it referred to "enemies" generally, with precisely the same intention and meaning. For instance, if we were at war with the Soviet Union, or a war was threatened, Congress could specifically order the expulsion of nationals of that particular country. The Constitution certainly does not bar treating in the same way alien members of the organization which the past thirty years have demonstrated to be merely the *alter ego* of the aggressive Communist state. For, unlike the Alien Enemy Act, the applicability of Section 22 of the Internal Security Act of 1950 is determined, not by the accidents of birth and ancestry, but by an alien's voluntary membership in the Communist Party. As this Court said in *American Communications Association* v. *Douds*, 339 U. S. 382, 391:

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affili-

> ations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

In sum, the overwhelming testimony received by Congress, confirmed by events of common knowledge, as to the purposes of the Communist Party and as to the major role played by aliens in organizing the Party and keeping it under the control of the Soviet Union, demonstrates that Section 22 is a reasonable exercise of Congress' plenary powers over aliens in order to protect the security of the United States, and does not violate the due process clause. And the history of expulsion legislation is sufficient to prove that Congress is entitled to make this judgment for itself and need not remit to individual hearings the issue of the Communist Party's nature and tenets.[43] See also *infra*, p. 61 *ff* (on the *ex post facto* and attainder provisions of the Constitution).

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[43] The basic fallacy in petitioner's argument (Pet. Br. 46–52) that due process is denied because no hearing is allowed on the nature of the Party is the failure to distinguish deportation from a criminal proceeding. The difference is pointed out clearly in the dissent in *United States* v. *Spector*, 343 U. S. 169, 174, an opinion on which petitioner relies heavily (Pet. Br. 49). Referring to a Chinese deportation case, Justice Jackson said in *Spector*, a criminal case (343 U. S. at 176, fn. 3):

> That Court thereby made it clear that there is a great distinction between deportation itself and a deportation order that may be made the basis of subsequent criminal punishment. It is that distinction which we press for here.

See also *Wong Wing* v. *United States*, 163 U. S. 228, discussed *infra*, pp. 63–64.

C. THE DEPORTATION OF PAST COMMUNISTS DOES NOT VIOLATE THE EX POST FACTO OR BILL OF ATTAINDER PROVISIONS OF THE CONSTITUTION

Although his petition does not mention or refer to the bill of attainder and *ex post facto* clauses in Article I, Section 9, clause 3, of the Constitution, but relies solely on the due process clause (see Pet. 4–6),[44] petitioner's brief discusses Article I, Section 9, clause 3 at some length (Pet. Br. 53–57, see also 40–42). While we ordinarily would not consider those issues properly here (see Brief for the Respondents, *Tom We Shung* v. *Brownell*, No. 241, this Term, pp. 13–14), we do not urge the Court to pass them in this case since they are expressly raised in the pending petition for certiorari to the Ninth Circuit in *Garcia* v. *Landon*, No. 279, Misc., also involving the validity of Section 22 of the Internal Security Act of 1950. See the Government's memorandum on the petition for the writ in *Garcia*, pp. 6–8.

1. *Ex post facto clause.*—The opinion in *Harisiades* addressed itself to a like contention and determined that there was no violation of the *ex post facto* clause (see 342 U. S. at 593–596).[45]

The secondary fallacy in petitioner's argument is his erroneous assumption that the rules applicable to citizens who are public servants are the same as those governing aliens whom Congress desires to deport. We discuss this contention *supra*, p. 24 *ff*.

[44] The "Question Presented" simply presents the issue whether Section 22 of the Internal Security Act of 1950 "is Constitutional" (Pet. 3).

[45] For a detailed discussion of the *ex post facto* clause and retrospective legislation, see the Government's brief in *Harisiades* (Oct. Term, 1951, Nos. 43, 206, 264), at pp. 102–116.

That ruling is *a fortiori* here, for when petitioner joined the Communist Party the 1940 deportation provision (upheld in *Harisiades*) had been on the books for several years, and he was even more adequately forewarned than were Harisiades, Coleman, and Mascitti who had all left the Party before 1940.

Petitioner argues as if the Congress had suddenly, in 1950, made aliens deportable for past membership in a wholly innocent organization like the Red Cross, which no one previously had any reason to suspect (see, especially, Pet. Br. 40–42). But, in the last decade and a half (and particularly after the passage of the Smith Act as a part of the Alien Registration Act of 1940), even those aliens who did not have personal knowledge of the Communist Party's advocacy of force would have had to live a hermit's life to be unaware that joining the Party was at least treading on dangerous ground and that many Americans, including some in the highest quarters, believed that the Party's goal was subversion and not peaceful change.[46] No alien who joined the Party during this period could be caught wholly

[46] Documentation at least as extensive as that set forth at Pet. Br. 29 *ff* and in the Appendix to Petitioner's Brief could be produced to show the mass of official and popular opinion, widely disseminated throughout the country, that the Party's methods and objectives included forcible subversion. Because the extensive holding of this opinion is a fact known to all, we refrain from matching petitioner's array of references and quotations.

unawares; the risk was known and knowable. Petitioner took the risk because, according to a Government witness, he wanted advancement and position in his union (T. 127), or because, as he said, he thought "they [*i. e.*, the Communists] were serving the interests of the American people" (T. 180). But the risk was knowingly taken, whether for those reasons or others, and petitioner is in no position to urge that he was innocently caught in a trap not of his own making.

2. *Bill of attainder clause.*—Section 22 does not violate the bill of attainder provision of Article I, Section 9, clause 3, of the Constitution, by specifically naming the Communist Party. See *Carlson* v. *Landon,* 342 U. S. 524, 535–6 (*supra,* pp. 32–33). A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *United States* v. *Lovett,* 328 U. S. 303, 315. As the Court has held again and again, deportation may be harsh, drastic, and severe, but it is not a criminal proceeding and it is not a punishment. *Carlson* v. *Landon,* 342 U. S. 524, 537; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 594–5.[47] The bill of attainder cases (*Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333, and *Pierce* v. *Carskadon,* 16 Wall. 234) on which petitioner

[47] To the same effect, see *Mahler* v. *Eby,* 264 U. S. 32, 39; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 709, 730; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Wong Wing* v. *United States,* 163 U. S. 228, 237.

relies (Pet. Br. 53–5) have been explained by the Court as proceeding "from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise" and "have never been considered to govern deportation," 342 U. S. at 595. And the specific holdings in *Harisiades, Mahler,* and *Bugajewitz,* that deportation is not a punishment for the purpose of the *ex post facto* clause, also dispose of the contention that a deportation statute can be a bill of attainder which necessarily inflicts punishment. See the concurring opinion in *United States* v. *Lovett,* 328 U. S. at 323.

Moreover, deportation is one legislative field in which there is a long history of naming specific groups—especially the Chinese and the anarchists. See *supra,* p. 55 *ff.* Of the Chinese deportation cases, *Wong Wing* v. *United States,* 163 U. S. 228, contrasting deportation of the Chinese and their punishment by imprisonment, most aptly demonstrates the inapplicability of the bill of attainer clause to deportation. A resident alien Chinese was summarily sentenced to 60 days at hard labor and then ordered deported, under the statute involved in *Fong Yue Ting* v. *United States, supra,* 149 U. S. 698 (discussed *supra,* pp. 14–16, 21, 55–56), for having been found in the United States without a certificate of residence. The sentence of imprisonment was condemned as punishment without a judicial trial. "It is not

consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." 163 U. S. at 237. See *United States* v. *Spector,* 343 U. S. 169, 174–177 (Jackson J., dissenting). But the deportation of Chinese was upheld, following *Fong Yue Ting.* "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U. S. at 237. Deportation was not to be considered as punishment.

Even if, despite this history and the Court's prior rulings, each deportation provision is to be individually tested to see whether it is an attempt to inflict punishment (see Pet. Br. 54–5), Section 22 is clearly valid. *Harisiades* establishes that there is a sufficient connection between past membership in a subversive organization and present desirability as a resident for Congress to take action to expel such aliens, not as punishment but in order to rid the country of a potential threat. 342 U. S. at 590–1, 595–6. That is what Congress sought to do in the 1940 Act and also in the 1950 legislation. The legislative history of both statutes establishes without doubt that Congress

thought the residence in this country of aliens who had previously been members of a subversive group was undesirable and dangerous. *Supra,* p. 40 *ff.* There was no purpose or attempt to punish. The history of the provision extends over a period of 30 years and this history shows that it is a direct method of accomplishing the Congressional objective of terminating the residence of such aliens, not an indirect attempt to reach some other result. Certainly, four distinct Congresses, in 1918, 1920, 1940, 1950, would not have entertained improper motives. It cannot therefore be said that this law was enacted, as were the Civil War statutes and the one involved in *United States* v. *Lovett,* 328 U. S. 303, to *punish* ascertained individuals or classes. Rather, it is a deliberate Congressional judgment that a particular class of aliens represents a danger to the welfare of the country and that its license to remain here should be revoked. Cf. *Hawker* v. *New York,* 170 U. S. 189, 196–7.

D. THE DEPORTATION OF PAST COMMUNISTS SUCH AS PETITIONER DOES NOT VIOLATE THE FIRST AMENDMENT

Neither the petition for certiorari in this case nor that now pending in *Garcia* v. *Landon,* No. 279 Misc., refers to the First Amendment (see *supra,* p. 61), but petitioner urges it in his brief on the merits (Pet. Br. 38–39). The authoritative answer for this case is given, once again, by the *Harisiades* decision (342 U. S. at 591–2). The

Court said that "the test applicable to the Communist Party has been stated too recently [in *Dennis* v. *United States,* 341 U. S. 494] to make further discussion at this time profitable." Petitioner was a member of the Communist Party, and his case is therefore precisely the same as *Harisiades.* Moreover, petitioner's membership in the Party came, at least in part, during the *Dennis* period (*supra,* pp. 4–5, 53; *infra,* pp. 71–72). See also *Carlson* v. *Landon,* 342 U. S. 524, 535–6 (*supra,* pp. 32–33).

E. SECTION 22 DOES NOT REQUIRE KNOWLEDGE BY THE ALIEN OF THE COMMUNIST PARTY'S ADVOCACY OF FORCIBLE OVERTHROW OF THE GOVERNMENT

In arguing that Section 22 should be construed as ordering the deportation of past members only if they knew of the Party's advocacy of violence (Pet. Br. 42–44), petitioner again brings forward a point presented neither in his petition nor Garcia's (*supra,* p. 61). The issue was extensively briefed by the Government in the *Harisiades* case (Brief for the United States, Oct. Term, 1951, Nos. 43, 206, 264, at pp. 31–47), and in upholding those deportations on the records before it (fn. 20, *supra,* p. 30), the Court must have rejected the contention that knowledge of the Party's aims was necessary under the 1940 Act.

In summary, the Government showed in *Harisiades* that (a) the pertinent deportation provi-

sions, both before and after their amendment in the 1950 Act, reveal a precise delineation between charges based on the alien's personal knowledge and beliefs and those predicated solely on his membership in designated organizations; (b) the legislative history of the Anarchist Deportation Acts of 1918 and 1920 shows clearly that Congress intended to deport alien members of the prohibited groups, regardless of whether their membership was maintained with knowledge of the denounced objectives; (c) the legislative history of the Alien Registration Act of 1940 shows the same purpose; (d) administrative and judicial rulings since 1918 have taken the same position; and (e) neither in the Internal Security Act of 1950 nor in Public Law 14 (Act of March 28, 1951), 82d Cong., 1st Sess., 65 Stat. 28, did Congress change this meaning.

If the 1940 Act does not require knowledge on the part of the alien, as this Court implicitly held in *Harisiades,* the 1950 statute must obviously be read the same way. For the Internal Security Act sought to "strengthen" the provisions of the former law relating "to the exclusion and deportation from the United States of subversive aliens." H. Rep. No. 3112, 81st Cong., 2d Sess., p. 54. As the Court said in *Harisiades* (342 U. S. at 590): "* * * we have an Act of one Congress [*i. e.,* the 1940 Act] which, for a decade, subsequent Congresses have never repealed but have

strengthened and extended." It is inconceivable that the 1950 Act retreated from the consistent three-decades-long legislative, administrative, and judicial construction of the prior law.[48]

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[48] In the Immigration and Nationality Act of 1952 (which became effective in December 1952), Congress has made provision for discretionary relief from deportation of certain aliens who would be otherwise deported as past Communists. Section 244 (a) (5) and 244 (c), 66 Stat. 163, 215, 216. The conditions of eligibility for such relief are: physical presence in the United States immediately following "the commission of an act, or the assumption of a status, constituting a ground for deportation"; proof that during all of this period the alien has been and is a person of good moral character; the alien must not have been served with a final order of deportation issued pursuant to the 1952 Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and the alien must be a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence.

Under Section 244 (c), Congress must concur in the Attroney General's suspension of deportation before it can become effective.

We are informed that favorable action has been taken by the executive in a few cases under this provision. The case of *Latva* (which is reported sub. nom. *Latva* v. *Nicolls*, 106 F. Supp. 658 (D. Mass., Wyzanski, J.) is now under administrative consideration.

II

THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE CHARGE THAT PETITIONER HAD BEEN A MEMBER OF THE COMMUNIST PARTY OF THE UNITED STATES

Petitioner contends strenuously that there was insufficient evidence to sustain the charge that he had been a member of the Communist Party of the United States after his entry into the United States (Pet. Br. 11–23). He makes the argument in this Court even though both courts below have specifically determined that the evidence was adequate,[49] and the "two-court" rule makes such concurrent findings "final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214. Moreover, in deportation *habeas corpus* proceedings, the Court does not "review the evidence beyond ascertaining that there is some evidence to support the deportation order" (*Bridges* v. *Wixon,* 326 U. S. 135, 149) and it is not enough to suggest, or even to prove, that the administrators erred either in deciding "that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence." *Tisi* v. *Tod,* 264 U. S. 131, 133; *Bilokumsky* v. *Tod,* 263 U. S. 149; *Vajtauer* v.

[49] The District Court found that "there was substantial evidence to support the warrant of deportation" (R. 14), and the Court of Appeals held that the evidential contention was "wholly without merit" (R. 33; 201 F. 2d at 306).

Commissioner, 273 U. S. 103; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 342–3.[50]

1. What is the evidence here? In his voluntary statements given on March 17 and 31, 1948 (T. 173–188),[51] petitioner freely admitted that he had been a *member* of the Communist Party from 1944 to 1946, and repeated this admission several times. He testified in detail as to the circumstances of his joining, naming the organizer who had induced him to join and the place where he had joined, and giving his reasons for joining. He stated that the last meeting he attended was in January 1947 (T. 188). At the close of the March 17 statement he said that he realized he had "made a mistake in joining the Communist Party," and offered to "rejoin" the Party as an informer if the Government would be lenient toward him (T. 182). Subsequently, in the March 31 statement, he denied having anything to do

[50] In the administrative hierarchy, the finding made by the hearing officer was affirmed by the Assistant Commissioner of the Immigration and Naturalization Service, and then by the Board of Immigration Appeals, which determined, "after careful consideration of all the evidence of record as well as the representations of counsel throughout" that petitioner was a member of the Party after entry.

[51] Transcripts of these statements were introduced as evidence, marked Exhibits 5 and 6, at petitioner's deportation hearing on January 12, 1950 (T. 104–105). By stipulation, these transcripts, and all other testimony previously taken in the case, were made part of the record in the final December 12, 1950, hearing, *supra*, p. 6.

with the distribution of Communist literature, but did not repudiate his prior admission that he had joined the Communist Party. In fact, he expressly affirmed that the statements he had given on March 17 were true (T. 184). He repeated his offer to give information about the Party if he were allowed to remain in the United States.[52]

In addition to petitioner's own admissions, a Government witness, Mrs. Meza, testified at the deportation hearing held on January 12, 1950, and gave further testimony as to petitioner's Communist Party membership. Her testimony, which by stipulation was made part of the record of the final December 12, 1950, hearing (on the basis of which petitioner was ordered deported), disclosed, *inter alia,* that petitioner attended meetings of the Spanish Speaking Club unit of the Communist Party, at San Diego which were

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[52] There is no doubt that Galvan gave a flat "yes" to the question "Then you were a *member* of the Communist Party from approximately 1944 to 1946 when you dropped out. Is that correct?" (T. 179) (emphasis added). He attended "about ten or twenty" meetings (T. 179) before he "dropped out" in January 1947. Well-known Communist booklets—including some of the classics of Soviet Communism—were distributed at the meetings and their sale and distribution promoted. He looked at some of these documents (T. 186–187). Lectures were also given about these books and they were discussed at the meetings (T. 188). The indisputable foundation and assumption of both March interviews was that petitioner was a *member* of the Communist Party from sometime in 1944 to January 1947.

attended only by Communists (T. 114–115), that petitioner was elected to the office of Educational Director of that unit (T. 118–119), and that in conversations with her petitioner had discussed his Party membership, indicating dissatisfaction with the way he had been treated by the Party (T. 127). Mrs. Meza mentioned at least one of the persons previously named by petitioner as associated with him in Communist Party activities (T. 113, 124). A reading of her testimony (including the cross-examination) can leave no doubt that she testified that (a) she joined the Communist Party in August 1946, (b) the Spanish Speaking Club was a Party unit at that time (and not merely a "front" organization), (c) that Galvan was a member of the Party at that time (as she was), and remained such until some time in 1947, and (d) he was elected educational director of that Party unit.[53]

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[53] Mrs. Meza testified that she joined the Communist Party in San Diego in August 1946, her membership first being solicited in May 1946 (T. 112). She knew Galvan from April or May 1946 (T. 114). In answer to the question "To what unit or units did you belong, of the Communist Party?", she answered "When I first joined I was a member of the National City and Chula Vista unit and shortly afterwards I was transferred to the Spanish Speaking Club in San Diego" (T. 114). She saw Galvan at at least seven meetings of the Spanish Speaking Club unit which "were unit meetings that were closed meetings to Communist Members of that local unit" (T. 114–115). Her membership card in the Communist Party "was issued to me either in the first or second meeting of the Spanish Speaking Club after I

2. Petitioner's attack on this evidence—which furnishes much more than substantial support for the administrative finding of membership in the Communist Party—takes several forms. An attempt is made, first, to discredit Galvan's voluntary admissions in March 1948, before the deportation proceedings began, as somehow untrustworthy (Pet. Br. 12–13). But there is no reason for this Court—let alone the immigration authorities or the two courts below—to go behind petitioner's unequivocal statements. Cf. *Bilokumsky* v. *Tod*, 263 U. S. 149, 151, 155–156. He was then a 37-year-old adult, who had been in this country for 30 years, spoke and understood English very well (as his entire testimony, then and later, clearly reveals); he signed every page

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became a member" (T. 116). She testified that Galvan held an office in "the Spanish Speaking Club unit of the Communist Party of the United States" (T. 119). She was present at an election of officers of the unit in October or November 1946 and Galvan was elected "Educational Director or Secretary of Education; I don't recall the official title" (T. 119). Dues were collected at the meetings she attended and Galvan was present when dues were collected (T. 120).

She had a conversation with "Bob" (Galvan)—which she placed in May or June of 1947—in which "he told me in that conversation when he had joined the Communist Party and why he had joined it" and why he was dissatisfied (T. 126–127). This conversation took place when Galvan took her home "from a meeting, a Communist meeting that we had both attended" and he told her "why he had joined the Communist Party and gave her a summary of his history in the Communist Party" (T. 134); they also discussed "other members of the Communist Party" (T. 136).

of the typed form of both March statements in a firm and practiced hand, and agreed at the end of the second interview that he had thoroughly understood all the questions asked him (T. 188). One gathers from his answers that he is quite acute and not at all slow-witted.[54] The immigration inspector (Chandler) who interviewed him was a witness at one of the later deportation hearings (T. 102–110), and testified as to the circumstances of the interviews. Before Galvan's statement was taken down stenographically, there was a preliminary period of questioning (T. 109), so that he was fully aware of the nature of the inquiry; all the matters developed in the informal discussion were covered in the formal questioning (T. 109). Galvan did not ask for counsel, and preliminary interrogation in the absence of counsel is not improper. *Bilokumsky* v. *Tod*, 263 U. S. 149, 156. And, contrary to petitioner's assertions, the inspector's questioning, far from being antagonistic or hostile, brought out much of the material which petitioner now records and uses as in his favor.[55]

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[54] Mrs. Meza's account of her conversation with him (*supra*, pp. 72–73) also indicates that he is not dull-witted but quite capable of understanding what he is doing and what goes on about him. He held offices in his Union local and in the CIO Council in San Diego (T. 177), as well as being elected educational director of his Communist Party unit.

[55] We note, as bearing on his present claims, petitioner's curious changes of position on Party membership, in the course of this proceeding. At the outset, he made the ad-

Secondly, it is said (in the brief on the merits, for the first time) that it was the Communist Political Association which petitioner joined in 1944, not the Communist Party, and there is no proof of membership in the subsequently reconstituted Party (Pet. Br. 12 *ff*). Whether it was the Political Association or the Party Galvan originally joined in 1944,[56] his own testimony and that of Mrs. Meza show plainly that he was a member of the *Party* in 1946, particularly after

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missions of March 1948. Then, when deportation proceedings were begun, he claimed his privilege against self-incrimination and refused to answer questions about Communist Party membership or about his prior admissions (T. 93). Still later, he simply denied that he had made the admissions in 1948, and declared (despite the overwhelming evidence to the contrary) that he had not understood the questions asked at that time and thought they related to some non-subversive organization like the "F. E. P. C." (T. 39–50). It may very well be that the immigration authorities could draw inferences adverse to petitioner from this twice-repeated change of position. Cf. *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154 (proper to infer alienage from failure to claim citizenship at deportation hearing).

Changes in his position between that taken in the District Court, the Court of Appeals, and in the petition for certiorari, on the one hand, and that now taken in the brief on the merits, on the other, are noted *infra*, pp. 76, 79–80.

[56] Petitioner consistently spoke of it, in the March 1948 inquiry, as the *Party*, and testified that he joined sometime in 1944, without specifying the month. His own brief (p. 17, fn. 8) points out that in California the Party did not dissolve and re-create itself as the Association until May 1944. On the other hand, he did testify that when he was asked to join he "was told that it wasn't a party at that time; that it was a political association" (T. 179).

August 1946 (when Mrs. Meza joined) and into 1947, either January 1947 (as he testified) or May or June 1947 (as she testified). *Supra,* pp. 71–73.[57] He may have begun to be dissatisfied with the Party, but he remained a participating member until 1947, and it is clear that he knew that the entity of which he was an active member was the Communist Party. Hardly any proof of "membership" could be better than these direct admissions and direct testimony by a co-member as to actual membership in the Party, attendance at closed party meetings, and election to party office; and membership during that period (1946–1947) is sufficient under the statute which requires no more than proof of some post-entry Party membership (*supra,* pp. 2–4).

There is simply no warrant in this record for petitioner's complex effort (Pet. Br. 20–23) to infuse into the case an issue-of-law as to the meaning of the word "member" in Section 22 of the 1950 Act. This is a case of "membership" and not merely of "affiliation," and it is also a case of participating membership and not that of a passive member whose name merely appears on a membership roll. On petitioner's own evidence and that of Mrs. Meza, any jury or administrative tribunal would be justified in finding that he was a participating member of the

[57] According to the *Dennis* case, the Communist Party was reconstituted in about April 1945; the conspiracy there charged began in April 1945 and continued to July 1948. 341 U. S. at 495, 498, 547–8, 561.

Party during a substantial portion of the period covered by the *Dennis* conviction, and for many months after he was dissatisfied (as he now states) with the turns in Party policy.[58]

The third component of petitioner's wholesale assault on the findings (Pet. Br. 14 ff.) calls to mind the mixture of conjecture, doubt, and suggestion commonly addressed by skilled advocates to factfinders in order to persuade them to disregard damaging testimony which appears to be unequivocally against the clients. All the factors stressed in petitioner's brief—*e. g.*, the Communist Party's supposed attitude toward aliens after 1939, the reconstituted Communist Party's assumed attitude toward members of the Communist Political Association, the refined and complicated exegesis of Mrs. Meza's words, etc.—would be fair argument to convince the immigration inspector not to take petitioner's and Mrs. Meza's testimony at face value. But now that the finding has been made and affirmed, something

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[58] On his own evidence and that of Mrs. Meza, petitioner's Party membership falls far outside the type of unreal "membership" referred to by Senator McCarran in the excerpt partially quoted and paraphrased at Pet. Br. 16, 21, 43. Galvan's membership was active and voluntary, and not accidental, artificial, unconscious, or in appearance only. It was not membership by operation of law or while a minor. See *supra*, pp. 67–69, and Brief for the United States in The *Harisiades* case (Oct. Term 1951, Nos. 43, 206, 264), at pp. 44–47. It is of interest that the same contention was suggested by Mascitti (Brief for the Appellant, Oct. Term 1951, No. 206, at pp. 30-32).

weightier is obviously required to move this Court to hold that testimony directly in point does not constitute substantial evidence. It is not enough to conjure up all the possible re-interpretations and explanations of that direct testimony.

Finally, petitioner seeks to attack the finding of Party membership by reiterating that he did not advocate violence or have reason to know that the Party did (Pet. Br. 17). We have already dealt with this contention in discussing the validity and meaning of the statute. *Supra,* pp. 29–36, 38, 40 *ff,* 55–60, 67–70. Congress has said that proof of Party membership is enough for deportation, and there is no requirement that the alien personally believe in violence or know that the Party does.[59]

3. As the foregoing review has shown, the evidence of record plainly calls for the finding

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[59] In the petition for certiorari (Pet. 7–8), but not in the brief on the merits, petitioner advances the wholly frivolous contention that, whatever the sufficiency of the evidence as to Communist Party membership, because the Party was referred to as the "Communist Party" (except in two instances where it was called the "Communist Party of the United States") the testimony was insufficient to prove that he was a member of the Communist Party of the United States. However, petitioner's and Mrs. Meza's testimonies show that he joined the Communist Party and participated in its activities in San Diego, California. It is beyond conjecture that it is the Communist Party of the United States that operates in San Diego, California. Petitioner's argument would be baseless in any event; membership in any branch or subdivision of the Communist Party, American or foreign, is grounds for deportation (see 8 U. S. C. (Supp. V) 137 (2) (C) (iv), *supra,* pp. 2–4).

that petitioner was an active member of the Communist Party after its reconstitution in 1945. At the very least, there was substantial evidence to warrant that administrative finding, and there was no denial of procedural due process.[60] "Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial."

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[60] In his petition for certiorari (Pet. 9–14), but not in the brief on the merits, petitioner claims that he was denied a fair hearing because a new charge was lodged after the record previously made in the case had been introduced by stipulation. *Supra*, pp. 6–7. This contention is wholly unsubstantial. The regulations (8 C. F. R. Sec. 151.2 (d)) authorized the lodging of additional charges if it developed during the hearing that there were grounds for deportation in addition to those contained in the warrant of arrest. On September 23, 1950, after the warrant had issued, petitioner became subject, by the enactment of Section 22 of the Internal Security Act of 1950, to deportation because of membership in the Communist Party. When this new charge was lodged in December 1950, petitioner's then counsel was asked if he desired a continuance to secure evidence on the new charge, but flatly declined the offer (T. 36). Nor did counsel seek to withdraw his previous consent to introduction of the prior transcripts (including petitioner's statements in March 1948), or indicate in any way that he would not have agreed to the introduction of the previously developed record had he known of the new charge, or attempt to have the hearing reopened for new evidence. In these circumstances, there is no justification for the claim of denial of a fair hearing.

Vajtauer v. *Commissioner,* 273 U. S. 103, 106, and see other cases cited *supra,* pp. 70–71.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1954.

APPENDIX

Section 2 of the Internal Security Act of 1950, 64 Stat. 987, provides:

> As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—
>
> (1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.
>
> (2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate them-

selves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication

and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the resent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common

defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1954

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 407

ROBERT NORBERT GALVAN, *Petitioner*

v.

U. L. PRESS, *Officer in Charge,* Immigration and Naturalization Service, United States Department of Justice, San Diego, California

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

This memorandum is submitted, by leave of the Court, in response to the Reply Brief for Petitioner. It is limited to certain of the matters discussed in that Reply Brief.

I

On petitioner's belated contention that Section 22 of the Internal Security Act of 1950 requires a finding that the alien was aware of the Communist Party's advocacy of forcible overthrow of the

Government, the discussion in our main brief (see pp. 67-69) incorporates and refers to the Government's *Harisiades* brief (Oct. Term, 1951, Nos. 43, 206, 264, at pp. 31-47).[1]

A. As for legislative history, in the narrow sense, we have nothing to add to the *Harisiades* discussion which fully deals, we believe, with the history since 1918 of this type of deportation legislation and particularly with the legislative history of Public Law 14 (including Senator McCarran's memorandum on which petitioner leans so heavily) (see *Harisiades* brief, pp. 29-31, 44-47). In view of petitioner's stress on the differences between the 1940 Act, involved in *Harisiades,* and the 1950 Act, involved here, it is appropriate for us to emphasize that the latter statute makes a specific distinction between aliens who are or were members of the Communist Party and members of Communist-front organizations required to register under the Subversive Activities Control Act; aliens belonging to such organizations are not to be deported if they "establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such organization was a Communist organization" (see *Harisiades* Brief, p. 34). Whatever may be true of the prior statutes, this clear distinction in the 1950 Act shows

[1] Additional copies of the *Harisiades* brief have been lodged with the Clerk.

that in the present statute Congress did not require any showing of knowledge or awareness where the membership is in the Communist Party itself.

B. Petitioner seeks to minimize (Reply Brief, pp. 2-3) the lower court judicial decisions holding mere membership sufficient under the prior legislation (see *Harisiades* Brief, pp. 43-44), but fails to point out that (a) in none of those cases does there appear to have been any administrative *finding* of knowledge of the Communist Party's aims or that the alien himself advocated forcible overthrow, and (b) in each case the court upheld the deportation order, without relying on evidence of the alien's knowledge or belief, on the basis of a finding of membership in which "membership" meant precisely what it means in the administrative findings here. In *Ex parte Vilarino,* 50 F. 2d 582, 586 (C.A. 9), the Court of Appeals expressly sustained the deportation, in an alternative holding, "quite apart" from the meager "evidence" of personal knowledge cited by petitioner here. In *In re Saderquist,* 11 F. Supp. 525, 526-7 (D. Me.), affirmed on opinion below, 83 F. 2d 890 (C.A. 1), the judge specifically disregarded the charge that the alien personally advocated force and confined himself to the two charges involving membership in unlawful organizations; the opinion is limited to determining whether the Labor Department

was "justified in finding that the organization in which the petitioner claims membership is one advocating the overthrow of our government by force" and quotes from *Kjar* v. *Doak*, 61 F. 2d 566, 569 (C.A. 7): "Nor was it necessary to prove that appellant had knowledge of the contents of the programs of the several organizations, or any one of them. It is sufficient if the evidence showed that he was a member of, or affiliated with, such an organization as contemplated by the statute." Similarly, *Kjar* v. *Doak*, *supra*, concerned itself solely with the issue of whether the Communist Party fell within the statutory class. The court first held—over the alien's objection that the Party advocated force only if the owners of capital refused to be peaceably dispossessed of their property once the Party has peaceably gained control of the government—that the evidence showed that the Party "believes and advocates the use of force and violence whenever and wherever sufficient power is present to accomplish the purpose" (61 F. 2d at 568). Only then did the court hold alternatively (in the portion of the opinion on which petitioner relies) that even on the alien's view of the Party it was proscribed. *Greco* v. *Haff*, 63 F. 2d 863, 864 (C.A. 9), petitioner admits to be contrary to his contention.[2]

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[2] Other cases (not mentioned in the *Harisiades* brief) declaring or assuming the irrelevance of the alien's knowledge are *Ungar* v. *Seaman*, 4 F. 2d 80, 81-2 (C.A. 8); *Fortmueller*

In *Bridges* v. *Wixon*, 326 U.S. 135, there were no findings that the alien possessed knowledge of the unlawful character and aims of the organization which he was alleged to have joined or have affiliated himself with (see *Ex parte Bridges*, 49 F. Supp. 292, 301 (N. D. Cal.), and discussion below), and this Court pointed out that "So far as this record shows the literature published by Harry Bridges, the utterances made by him * * * revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute" (326 U.S. at 148; see also p. 149). If petitioner's view of the statute were correct, the omission of any findings on Bridges' knowledge of the character of the proscribed organizations, coupled with this evidence of his personal beliefs, would certainly have made for summary disposition of the charge based on membership in the Communist Party. Hardly more than a paragraph pointing out the deficiencies in the record would have been required. But the Court did not dispose of the case on that ground; on the contrary it discussed at length the inadmissibility of O'Niell's testimony as to the alien's membership. The latter half of the opinion (326 U.S. at 149-156) can only

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v. *Commissioner*, 14 F. Supp. 484, 487 (S.D. N.Y.); and *United States* v. *Wallis*, 268 Fed. 413, 415-6 (S.D. N.Y.) (the latter two are discussed *infra*). See also *Harisiades* v. *Shaugnessy*, 187 F. 2d 137, 141 (C.A. 2), affirmed, 342 U.S. 580.

be read as adopting the view that "membership" in the deportation statutes means no more than membership in the ordinary sense—the voluntary enrolling of oneself in an organization.

Petitioner relies on a number of cases not cited by us (Reply Br. 3) in which it is said "the courts *assumed* the materiality of knowledge and emphasized, in holding the alien deportable, his personal knowledge and endorsement of the Party's subversive aim during his membership" (emphasis added). But in none of these cases was the materiality of knowledge assumed. *Fortmueller* v. *Commissioner,* 14 F. Supp. 484, 485 (S.D. N.Y.), involved two charges of personal advocacy of violence; as to these, the evidence plainly had to deal with the alien's beliefs and it is in connection with these charges alone that the court discusses such evidence. On the third charge (membership in the Communist Party) (14 F. Supp. at 487), the court does not refer to the alien's own knowledge or belief. *United States* v. *Wallis,* 268 Fed. 413, 415-6 (S.D. N.Y.) held—despite the statement in the Reply Brief—that mere proof of membership in the Party was sufficient, and upheld a deportation order even though the alien apparently claimed that he understood the Party not to contemplate violence. In *Branch* v. *Cahill,* 88 F. 2d 545, 546-7 (C.A. 9), and *United States ex rel. Lisafeld* v. *Smith,* 2 F. 2d 90, 91 (W.D. N.Y.), there happened to be evidence of personal belief which

the court, quite naturally, set forth in upholding the deportation order; this does not mean, of course, that such evidence was essential.[3]

The short of the matter is that we know of no case, under the prior statutes, declaring that knowledge is essential where the charge is membership, and several decisions (beginning in the early '20's) stating that it is not required, or acting on that premise.[4]

C. The administrative practice is set forth in the *Harisiades* brief, pp. 44, 91 (see our main brief in this case, p. 31, fn. 20). For over thirty years, the Immigration Service has held proof of mem-

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[3] *United States ex rel Kettunen* v. *Reimer*, 79 F. 2d 315, 317 (C.A. 2) involved "affiliation" and not "membership."

[4] Petitioner's discussion of the cases seems to suggest that a finding of awareness is unnecessary and that it is sufficient that there be some evidence in the record from which the court can infer knowledge or assume that the administrator inferred it. If that be the rule, petitioner can gain no comfort from it. For there is evidence that he attended ten or twenty Communist Party meetings; that he was elected educational director of his Party unit; that he heard lectures at Party meetings on Communist books; that he saw lying around copies of the "Communist Manifesto," "The Communists in Action," "Left-wing Communism, an Infantile Disorder," "The Struggle Against Imperialist War and the Tasks of the Communists," and "Foundations of Leninism;" and that he "looked over" "Left-wing Communism." See our main brief, pp. 71-74. And there must be added to this specific testimony the evidence indicating that petitioner knows what he is about. See our main brief, pp. 74-77, and Mrs. Meza's account of her conversation with Galvan on his reasons for joining the Party (T. 126 *et seq.*)

bership and (prior to 1950) of the nature of the organization to be sufficient, and has not deemed it necessary in its deportation proceedings to introduce evidence of the alien's personal beliefs or knowledge or to make findings thereon where the charge is one of membership.[5] This practice and policy is revealed and confirmed by the available decisions of the Board of Immigration Appeals. See Matter of H [*Harisiades*], 3 I. & N. Dec. 411, 455, 458 (see our *Harisiades* brief, pp. 6-7); Matter of D, 3 I. & N. Dec. 787, 788-9; Matter of O, 3 I. & N. Dec. 736, 737 (referred to in our *Harisiades* brief, p. 44); Matter of Coleman (Transcript of Record, No. 264, Oct. Term, 1951, pp. 20-24); Matter of Mascitti (Transcript of Record, No. 206, Oct. Term, 1951, pp. 14, 17).[6] And it is

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[5] Of course, where the charge is one of personal advocacy, evidence of the alien's beliefs has been introduced, and even in membership cases such evidence has sometimes been brought out, by the alien or the Service, where it is readily available.

[6] In some of its decisions in which counsel have raised the issue of knowledge (*e.g.*, Matter of O, and Mascitti's case, *supra*), the Board of Immigration Appeals has said—in addition to holding flatly that it is unnecessary to prove knowledge—that membership in itself is sufficient evidence of knowledge of the proscribed doctrines, and also that the evidence showed that the alien attended Party meetings, read its literature, listened to speeches, and paid his dues.

If the last-mentioned factor is at all material, it is present here. Galvan attended several Party meetings, was elected to Party office, heard lectures on Party literature, and scanned some of this literature. See our main brief, pp. 71-74, and *supra*, fn. 4.

especially significant that, in the *Bridges* deportation case, neither Presiding Inspector Sears nor the Attorney General found that Bridges knew or was aware of the unlawful objective of the Communist Party, nor did either of them discuss the matter of Bridges' knowledge in connection with the finding of Party membership or of Party affiliation; the same is true of the decision of the Board of Immigration Appeals adverse to deportation. See Transcript of Record, No. 788, Oct. Term, 1944, pp. 73-106, 134-341, 367-492.[7]

The judicial decisions in Communist deportation cases also show that the administrative practice has been that findings as to the alien's awareness of the Party's doctrines are unnecessary, and it is sufficient to prove membership in the conventional sense. See the cases discussed *supra* and in

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[7] Bridges excepted to Judge Sears' failure to find that "the evidence does not establish that the alien had knowledge that the Communist Party of the U.S.A. at any time was an organization, association, society, or group" with the proscribed objectives (Transcript of Record, No. 788, Oct. Term, 1944, pp. 351-2). The same point was raised in the District Court (see *Ex parte Bridges*, 49 F. Supp. 292, 301 (N.D. Cal.) (discussed above), but was apparently not pressed in the Court of Appeals or in this Court. In *Bridges* v. *Wixon*, 326 U.S. 135, 149, the Court quoted an excerpt from the decision of Dean Landis, in the prior deportation proceeding, which indicated that Bridges expressed disbelief that the methods the Party wished to employ "were as revolutionary as they generally seem" and was unequivocal in his "distrust of tactics other than those that are generally included within the concept of democratic methods."

the Reply Brief at pp. 2-3, as well as the cases cited in our main brief at p. 51. The same understanding of the administrative practice seems indicated by informed writers on the subject. See Landis, *Deportation and Expulsion of Aliens,* 5 Encyc. of Soc. Sci. (1930), p. 97 ("possession of the [radical] belief is unnecessary, mere ignorant membership in a radical party being sufficient"); Clark, *Deportation of Aliens from the United States to Europe* (1931), pp. 222-223; Van Vleck, *The Administrative Control of Aliens* (1932), pp. 38-39, 88-89, 129-131.

D. Despite the statement in the Reply Brief (p. 4) that in *Harisiades* the Government argued that the aliens "were deportable because of their knowledge of the Party's aim of overthrow," the fact is otherwise. The Government said unequivocally, as to Harisiades, Coleman and Mascitti, that "on these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge" (*Harisiades* brief, p. 91; main brief in this case, p. 31, fn. 20), and it based its entire argument on that assumption. All that the Government did in the portion of its brief to which petitioner refers (*Harisiades* brief, pp. 47-49) was to show that the three aliens each joined the Communist Party voluntarily and not under duress, and that they knew it was the Communist Party of which they were members.

In the terms of Public Law 14 (Act of March 28, 1951, 65 Stat. 28), their membership was voluntary, and was not "(a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes." Nor was their membership like that of the member of the Socialist Party in *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. Mass.) who suddenly and automatically found himself a member of something called the Communist Party.

The same is obviously true of Galvan. He knew it was the Communist Party of which he was a member, and his membership was uncoerced and while he was a full-fledged adult in his middle thirties. He attended and participated in meetings, heard lectures on Party literature and scanned some of it, and was elected to Party office. See our main brief, pp. 71-74, and *supra*, fn. 4.

II

Throughout his Reply Brief (*e.g.*, pp. 5, 7, 10) as in much of his main argument, petitioner seems to assume that the period of his Communist Party membership coincided with the "war-time alliance with Russia," the "Soviet-American alliance." But the record shows that his membership lasted until January 1947 when he attended his last meeting (on his own testimony), or until May or

June 1947 (on Mrs. Meza's testimony). See our main brief, pp. 71-74. He was elected educational director of his Party unit in the Fall of 1946. This was long after the World War II period of "Soviet-American friendship," and over a year after the beginning (in April 1945) of the conspiracy adjudged in the *Dennis* case. Indeed, petitioner's remarks in his Reply Brief on the nature of the Communist *Party* during World War II are quite at variance with his effort in his main brief (pp. 11, *et seq.*) to show that the entity which was active in that period was not the Party at all but the Communist *Political Association.* What petitioner now says may or may not be true of the Political Association, but it is certainly not true of the Party after its reconstitution early in 1945.

III

The Reply Brief also argues (pp. 10-11) that the Immigration and Naturalization Service must have discredited Mrs. Meza, the Government witness, because the hearing officer found that Galvan was a "member of the Communist Party between 1944 and 1946," and part of Mrs. Meza's testimony related to a conversation with Galvan in May or June 1947, when he was still a Communist, according to her testimony.

There are two answers. In the first place, the charge which was found proved was merely that petitioner had been a member of the Party after

entry into the United States, and both the Assistant Commissioner of the Service and the Board of Immigration Appeals found that this charge was proved, without specifying any dates of membership. Referring to the "entire record" or "all of the evidence of record,"[8] both of these determinations simply find that petitioner had been a member of the Party after entry. And *Bridges* v. *Wixon*, 326 U.S. 135, 152, holds that it is not the hearing officer but the higher ranks in the administrative hierarchy who are the deciding bodies in deportation cases.

Secondly, Mrs. Meza testified to events taking place in 1946, including petitioner's membership in a Party unit, election to office in the Fall of that year, and attendance at Party meetings. A substantial part of her testimony clearly dealt with that year and would therefore be relevant even to membership which terminated at the close of the year.

IV

In Section 22 of the 1950 Act, Congress was not merely—as petitioner urges (Reply Br., pp. 7-8)—enacting into a "conclusive presumption" its legislative determination that the Communist Party advocated the forcible overthrow of the Government. As pointed out in oral argument,

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[8] In the face of these statements, there is nothing to support the claim that only petitioner's admissions were considered.

Congress was not merely declaring that the Party fell within the previously-defined general class of organizations with unlawful objectives. Congress was creating a new class of deportable aliens:—those belonging to an entity which both advocates violence and at the same time is, and has been, under the direction and control of the "Communist dictatorship of a foreign country." See Section 2 of the 1950 Act, reprinted in our main brief, pp. 82-87. The factor of control by the Soviet Union, stressed by the Committee on the Judiciary (see our main brief, pp. 47-48), is a factor new to our deportation legislation and cannot be disregarded. Only the Communist Party and its affiliates and associated groups fall within the new class, and Congress was therefore not singling out the Party for a special legislative "determination." In the Alien Enemy Act of 1798, the Congress adopted similar legislation providing for the removal of nationals of enemy countries or of nations which threatened invasion of this country or a "predatory incursion."

In any event, as our main brief shows (pp. 54, *et seq.*), there is no constitutional objection to such action by Congress in the area of deportation. In that field, restraints on legislative power are at the minimum, if they exist at all, and accordingly the power to be more specific rather than more general is at its greatest. For, like the converse problem of generality or indefiniteness in legislation,

the permissible limits of specificity depend upon the subject matter with which Congress is dealing, the class of persons affected by the legislative action, and the type of sanction involved. Here, where the legislative action orders the deportation of aliens, the power of Congress over subject matter, persons, and sanction is "plenary."

CONCLUSION

For the foregoing reasons, and those discussed in our main brief, we respectfully submit the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 407.—October Term, 1953.

Robert Norbert Galvan, Petitioner, *v.* U. L. Press, Officer in Charge, Immigration and Naturalization Service, etc.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 24, 1954.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner, an alien of Mexican birth, first entered the United States in 1918 and has since resided here with only occasional brief visits to his native country. In the course of two questionings, in March 1948, by the Immigration and Naturalization Service, he indicated that he had been a member of the Communist Party from 1944 to 1946. In March of 1949, the petitioner was served with a deportation warrant, and on the same day a preliminary deportation hearing was held to acquaint him with the charges against him—that after entry he had become a member of an organization which advocated the violent overthrow of the United States Government, and of an organization which distributed material so advocating. In December 1950, petitioner had a *de novo* hearing at which the transcripts of all earlier proceedings were, by agreement, made part of the record. Shortly after the hearing commenced, the examining officer lodged the additional charge against the petitioner that he had been a member of the Communist Party, membership in which had been made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008.

At this final hearing the evidence against the petitioner was derived from two principal sources. The first was his own testimony during the two interrogations by immigration authorities in 1948. During those interrogations, he had testified as to the time and place he had joined the Communist Party, talked freely about his membership in the Party, and indicated generally that the distinction between the Party and other groups was clear in his mind; he had explained that the reason he had not applied for naturalization was that he feared his former Party membership might be revealed, and had offered to make amends by rejoining the Party as an undercover agent for the Government. At the hearing in December of 1950, petitioner denied that in his prior hearing he had admitted joining the Party, insisting that at the time he thought the question related to labor union activities. In response to a question whether he had ever attended meetings of the Spanish Speaking Club, an alleged Communist Party unit, he replied: "The only meetings I attended were relating to the Fair Employment Practices Committee."

The second source of information was the testimony of a Mrs. Meza to the effect that she had been present when petitioner was elected an officer of the Spanish Speaking Club. Petitioner denied the truth of this and other statements of Mrs. Meza calculated to establish his active participation in the Communist Party and said: "She must have been under great strain to imagine all those things."

The Hearing Officer found that petitioner had been a member of the Communist Party from 1944 to 1946 and ordered him deported on that specific ground. He did not deem it necessary to make findings on the more general charges contained in the original warrant. The Hearing Officer's decision was adopted by the Assistant Commissioner and an appeal was dismissed by the Board of Immigration Appeals. A petition for a writ of habeas

corpus was denied by the District Court, and the dismissal was affirmed by the Court of Appeals for the Ninth Circuit. 201 F. 2d 302.

On certiorari, petitioner challenged the sufficiency of the evidence to sustain deportation under § 22 of the Internal Security Act of 1950 and attacked the validity of the Act as applied to him.[1] These are issues that raise the constitutionality and construction of the 1950 Act for the first time and so we granted certiorari. 346 U. S. 812.

Petitioner's contention that there was not sufficient evidence to support the deportation order brings into question the scope of the word "member" as used by Congress in the enactment of 1950, whereby it required deportation of any present or former "member" of the Communist Party.[2] We are urged to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of vio-

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[1] In his petition, petitioner also contended that the procedure used against him was unfair because of the new charge lodged by the Examining Officer in the December 1950 hearing. Apart from the fact that this claim was not pressed in the argument or petitioner's brief, it is sufficient to note that there was no element of surprise in the additional charge, since it was simply in more specific terms the same ground for deportation that petitioner already knew he had to defend against, namely, membership in the Communist Party. Furthermore, petitioner declined the Hearing Officer's offer of a continuance to meet the new charge.

[2] Section 22 of the Internal Security Act of 1950 provides that the Attorney General shall take into custody and deport any alien "who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in Section 1 (2) of this Act . . . ."

Subparagraph (C) of § 1 (2) lists "Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ." The substance of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205; 8 U. S. C. § 1251 (a)(6)(C).

lence, and who, by so joining, thereby committed themselves to this violent purpose.

But the Act itself appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program. In the same section under which the petitioner's deportation is sought here as a former Communist Party member, there is another provision, subsection (2)(E), which requires the exclusion or deportation of aliens who are "members of or affiliated with" an organization required to register under the Internal Security Act of 1950,[3] "unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization . . . that such organization was a Communist organization." 64 Stat. 1007. In describing the purpose of this clause, Senator McCarran, the Act's sponsor, said: "Aliens who were innocent dupes when they joined a Communist Front organization, as distinguished from a Communist political organization [such as the Communist Party], would likewise not ipso facto be excluded or deported." 96 Cong. Rec. 14180. In view of this specific escape provision for members of other organizations, it seems clear that Congress did not exempt "innocent" members of the Communist Party.

While the legislative history of the 1950 Act is not illuminating on the scope of "member," considerable light was shed by authoritative comment in the debates on the statute which Congress enacted in 1951 to correct what it regarded as the unduly expanded interpretation by the Attorney General of "member" under the 1950 Act. 65

[3] Under § 7 of the Internal Security Act of 1950, "Communist-action" and "Communist-front" organizations are required to register as such with the Attorney General. Section 13 provides that where such an organization fails to register the Attorney General may institute proceedings requiring such registration.

Stat. 28. The amendatory statute dealt with certain specific situations which had been brought to the attention of Congress and provided that where aliens had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life, they were not to be deemed to have been "members." In explaining the measure, its sponsor, Senator McCarran, stated repeatedly and emphatically that "member" was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918, 97 Cong. Rec. 2368–2374. See S. Rep. No. 111, 82d Cong., 1st Sess. 2; H. R. Rep. No. 118, 82d Cong., 1st Sess. 2. To illustrate what "member" did not cover he inserted in the Record a memorandum containing the following language quoted from *Colyer* v. *Skeffington,* 265 F. 17, 72: "Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge." 97 Cong. Rec. 2373.

This memorandum, as a weighty gloss on what Congress wrote, indicates that Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class. For example, the circumstances under which the finding of membership was rejected in *Colyer* v. *Skeffington, supra,* would not have been covered by the specific language in the 1951 Act. In that case, the aliens passed "from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities." 265 F., at 72.

On the other hand, the repeated statements that "member" was to have the same meaning under the 1950 Act as previously, preclude an interpretation limited to those who were fully cognizant of the Party's advocacy of violence. For the judicial and administrative decisions prior to 1950 do not exempt aliens who joined an organization unaware of its program and purposes. See *Kjar* v. *Doak*, 61 F. 2d 566; *Greco* v. *Haff*, 63 F. 2d 863; *In the matter of O.—*, 3. I. & N. Dec. 736.

It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

On this basis, the Hearing Officer's finding that petitioner here was a "member" of the Communist Party must be sustained. Petitioner does not claim that he joined the Party "accidentally, artificially, or unconsciously in appearance only," to use the words in Senator McCarran's memorandum. The two points on which he bases his defense against the deportation order are, first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program. The evidence which must have been believed and relied upon for the Hearing Officer's finding that petitioner was a "member" is that petitioner was asked to join the Party by a man he assumed to be an organizer, that he attended a number of meetings and that he did

not apply for citizenship because he feared his Party membership would become known to the authorities. In addition, on the basis of Mrs. Meza's testimony, the Hearing Officer was entitled to conclude that petitioner had been active in the Spanish Speaking Club, and, indeed, one of its officers. Certainly there was sufficient evidence to support a finding of membership. And even if petitioner was unaware of the Party's advocacy of violence, as he attempted to prove, the record does not show a relationship to the Party so nominal as not to make him a "member" within the terms of the Act.

This brings us to petitioner's constitutional attack on the statute. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, sustained the constitutionality of the Alien Registration Act of 1940. 54 Stat. 670. That Act made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation, notwithstanding that membership in such organization had terminated before enactment of the statute. Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the government. The Internal Security Act of 1950 dispensed with the need for such proof. On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the Act that the "Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification

by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

In this respect—the dispensation with proof of the character of the Communist Party—the present case goes beyond *Harisiades*. But insofar as petitioner's constitutional claim is based on his ignorance that the Party was committed to violence, the same issue was before the Court with respect to at least one of the aliens in *Harisiades*.

The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a "person," an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deprive a man "of all that makes life worth living"; and, as it has said in *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; "deportation is a drastic measure and at times the equivalent of banishment or exile."

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries*

Co., 251 U. S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation,[4] should be applied to deportation.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U. S. 86, 101; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

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[4] First in *Ogden* v. *Saunders*, 12 Wheat. 213, 271, and again in *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (appendix), a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the *ex post facto* Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in *Calder* v. *Bull*, 3 Dall. 386. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See *Bugajewitz* v. *Adams*, 228 U. S. 585, and *Ng Fung Ho* v. *White*, 259 U. S. 276, 280.

Judgment affirmed.

MR. JUSTICE REED concurs in the judgment of the Court and in the opinion as written, except as to the deductions drawn from Senator McCarran's citation of *Colyer* v. *Skeffington*, 265 F. 17, 72.

SUPREME COURT OF THE UNITED STATES

No. 407.—October Term, 1953.

Robert Norbert Galvan, Petitioner, *v.* U. L. Press, Officer in Charge, Immigration and Naturalization Service, etc.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 24, 1954.]

Mr. Justice Black, with whom Mr. Justice Douglas concurs, dissenting.

Petitioner has lived in this country thirty-six years, having come here from Mexico in 1918 when only seven years of age. He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served this country as a paratrooper. Since 1940 petitioner has been a laborer at the Van Camp Sea Food Company in San Diego, California. In 1944 petitioner became a member of the Communist Party. Deciding that he no longer wanted to belong to that party, he got out sometime around 1946 or 1947. As pointed out in the Court's opinion, during the period of his membership the Communist Party functioned "as a distinct and active political organization." See *Communist Party* v. *Peek*, 20 Cal. 2d 536, 127 P. 2d 889. Party candidates appeared on California election ballots, and no federal law then frowned on Communist Party political activities. Now in 1954, however, petitioner is to be deported from this country solely because of his past lawful membership in that party. And this is to be done without proof or finding that petitioner knew that the party had any evil purposes or that he agreed with any such purposes that it might have had. On the

contrary, there is strong evidence that he was a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of government.

For joining a lawful political group years ago—an act which he had no possible reason to believe would subject him to the slightest penalty—petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country. Perhaps a legislative act penalizing political activities legal when engaged in is not a bill of attainder. But see *United States* v. *Lovett,* 328 U. S. 303, 315–316. Conceivably an Act prescribing exile for prior innocent conduct does not violate the constitutional prohibition of *ex post facto* laws. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 412–415. It may be possible that this deportation order for engaging in political activities does not violate the First Amendment's clear ban against abridgment of political speech and assembly. Maybe it is not even a denial of due process and equal protection of the laws. But see dissenting opinions in *Carlson* v. *Landon,* 342 U. S. 524, and *Harisiades* v. *Shaughnessy,* 342 U. S. 580. I am unwilling to say, however, that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.

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[May 24, 1954.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

As Mr. Justice Black states in his dissent, the only charge against this alien is an act that was lawful when done. I agree that there is, therefore, no constitutional basis for deportation, if aliens, as well as citizens, are to be the beneficiaries of due process of law.

The case might, of course, be different if the past affiliation with Communism now seized upon as the basis for deportation, had continued down to this date. But so far as this record shows, the alien Galvan quit the Communist Party at least six years ago. There is not a word in the present record to show that he continued his affiliations with it *sub rosa* or espoused its causes or joined in any of its activities, since he ceased to be a member of it.

I cannot agree that because a man was once a Communist, he always must carry the curse. Experience teaches otherwise. It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned

to a more orthodox political faith. The record is wholly silent about Galvan's present political activities. Only one thing is clear: Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected.

This action is hostile to our constitutional standards, as I pointed out in *Harisiades* v. *Shaughessy*, 342 U. S. 580, 598. Aliens who live here in peace, who do not abuse our hospitality, who are law-abiding members of our communities, have the right to due process of law. They too are "persons" within the meaning of the Fifth Amendment. They can be molested by the government in times of peace only when their presence here is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed.